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In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE, PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16977
D.C. No. CV-90-00473-OWW

WILEMAN BROTHERS & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.;

AND

MIHARA FARMS, PLAINTIFFS-APPELLANTS,

V.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT-APPELLEE.

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the Eastern District of California Oliver W. Wanger, District Judge, Presiding

Argued and Submitted February 13, 1995—
San Francisco, California

Filed June 27, 1995
Amended September 18, 1995

BEFORE: Thomas Tang* and Diarmuid F. O'Scannlain, Circuit Judges; Robert R. Merhige, Jr.,** District Judge.

Opinion by Judge O'Scannlain

ORDER

The opinion filed on June 27, 1995 at slip op. 7401 is amended as follows:

Slip op. at 7409, n.1: After "1991" delete the remainder of the first sentence. The sentence is amended to read as follows: "The plum portion of the order was terminated in 1991."

Slip op. at 7409, n.1: Delete the word "also" in the second sentence of footnote one. The sentence is amended to read as follows: "The provisions relating to pears are no longer at issue."

Slip op. 7436: Add the following sentence at the end of the first full paragraph after the citation to *Cal-Almond:* "On remand, the district court may consider arguments regarding any assessments which were levied under the generic advertising programs."

The panel has voted to deny the petitions for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc, and Judge Merhige has so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

O'SCANNLAIN, Circuit Judge:

We must delve into one of the more byzantine, and all-encompassing, areas of federal administrative regulation—that governing fruits and vegetables. In the process, we decide whether various regulations governing the size, maturity, and advertising of California tree fruits are arbitrary and capricious or otherwise in violation of the rights of those who handle and process the fruits.

I

Wileman Brothers & Elliott, Inc. and other growers, handlers, and processors of tree fruits in California (collectively "the handlers") challenge various regulations contained in the nectarine and peach marketing orders, 7 C.F.R. §§ 916, 917, promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* The marketing orders set standards for, among other things, fruit maturity and minimum size. The marketing orders also impose assessments on handlers for the costs of a generic advertising program. The handlers claim that several of these regulations violate their free speech rights, due process rights, the Agricultural Marketing Agreement Act, and the Administrative Procedure Act.

A

The Agricultural Marketing Agreement Act of 1937 (the "Act") is the offspring of the Agricultural Adjustment Act, one of the pillars of the New Deal legislative program. The purpose of the Act is "to establish and maintain ... orderly marketing conditions for agricultural

commodities in interstate commerce." 7 U.S.C. § 602(1). The Act authorizes the Secretary of Agriculture to promulgate marketing orders for certain fruits and vegetables. The marketing orders regulate the quality of the commodity and the quantity that may be shipped to market. 7 U.S.C. §§ 608c(6), (7). Everything from avocados to prunes may fall within the reach of these orders.

Marketing orders must be subjected to the notice and comment requirements of the Administrative Procedure Act ("APA"). 7 U.S.C. §§ 608c(3), (4). In addition, marketing orders must be approved by either two-thirds of the affected producers or by producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(9)(B).

Marketing orders are implemented by committees composed of members of the regulated industry. 7 U.S.C. §§ 608c(7)(C), 610. Committee members are appointed by the Secretary and supervised by the Agricultural Marketing Service, an agency within the United States Department of Agriculture ("USDA"). 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. The committees recommend rules and regulations to the Secretary to effectuate the marketing orders and to govern such matters as fruit size, fruit maturity, and advertising. The Secretary may then adopt the committees' recommendations through informal rulemaking. 7 C.F.R. §§ 916.51-52, 917.40-41. All committee rules and regulations are "subject to the continuing right of the Secretary to disapprove of the same at any time." 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.30, 917.62.

The expenses to administer the marketing orders are funded through assessments imposed on fruit handlers based upon the volume of fruit they ship. 7 U.S.C. § 610(b)(2)(ii). Expenses fall into four general categories: administration, inspection services, research, and advertising and promotion. The committees are required to submit annual budgets to the Secretary, along with a recommendation as to the rate of assessment for the year. 7 C.F.R.

§§ 916.31(c), 917.35(f). The Secretary approves the committees' budgets and the assessments to be imposed on handlers each year in the form of a regulation.

Any handler may file a petition with the Secretary requesting a modification of the marketing order or an exemption. 7 U.S.C. § 608c(15)(A). An administrative law judge ("ALJ") hears the petition initially, and appellate review is available from the Judicial Officer ("JO") of the USDA. The Secretary's decision, as made by the JO, may be appealed to the district court. 7 U.S.C. § 608c(15)(B). The Secretary is also authorized to seek injunctive relief to compel compliance with all marketing order requirements. 7 U.S.C. § 608a(6).

B

In 1958, the Secretary promulgated Marketing Order 916, which regulates nectarines grown in California. 7 C.F.R. pt. 916. The Nectarine Administrative Committee administers the order. The Committee has authority to make rules governing the production and quality of nectarines within its jurisdiction. 7 C.F.R. § 916.30(c). In 1959, the Secretary promulgated Marketing Order 917, which regulates the handling of peaches, pears, and plums grown in California.[1] 7 C.F.R. pt. 917. The Peach Commodity Committee and the Pear Commodity Committee administer the order. These committees also have authority to make rules governing the production and quality of peaches and pears within their jurisdiction. 7 C.F.R. § 917.33(b).

The marketing orders are primarily quality control measures, and each order contains numerous specific regulations. The handlers challenge three particular regulations: (1) the assessments imposed upon handlers to

[1]The plum portion of the order was terminated in 1991. The provisions relating to pears are no longer at issue.

support a generic advertising program; (2) the "well-matured" standard for fruit maturity; and (3) the fruit minimum size standards. These regulations will be discussed in greater detail below.

Appellant Wileman Bros. & Elliott, Inc. ("Wileman") farms approximately 3000 acres of tree fruits. Appellant Kash, Inc. farms approximately 1300 acres of peaches, plums, and nectarines. Both farms pack and market their own fruit, as well as the fruit of other farms, through their own packing houses. Wileman, Kash, and the other appellants have encountered problems with some of their fruit varieties under the maturity and minimum size standards. Beginning in 1987, Wileman and the other handlers began withholding the assessments they were required to pay under the marketing orders.[2]

The complexity of the legal proceedings in this case have been matched by their prolixity. In April 1987, Wileman filed a petition pursuant to 7 U.S.C. § 608c(15)(A) with the USDA challenging the maturity standards and several other portions of the marketing orders. In June 1988, Wileman filed a second petition challenging the maturity standards as amended in 1988 and the generic advertising regulations. In May 1989, the ALJ issued a 400-page final decision on the first petition and ruled for Wileman. In May 1991, the ALJ issued a 369-page final decision on the second petition and again ruled for Wileman.

In the interim, Wileman had also filed a complaint in district court challenging the maturity standards and seeking a temporary restraining order. On August 7, 1987, the district court concluded that it lacked subject matter

[2]Pursuant to a July 6, 1989 order of the district court, the handlers have paid the assessments due from 1987 to the present into a trust fund account pending resolution of their claims. The majority of handlers subject to the marketing orders continued to pay their assessments, though the amounts increased due to the lost funds from the objecting handlers.

jurisdiction because Wileman had not exhausted its administrative remedies. On appeal, this court affirmed in an unpublished disposition. *Wileman Bros. & Elliott, Inc. v. Yeutter,* No. 87-2938 (9th Cir. Oct. 29, 1990). We noted, however, that we were "appalled by the failure of the Secretary to deal expeditiously with the substantial grievances alleged in this complaint."

In September 1991, the JO of the USDA ruled on Wileman's consolidated petitions, as well as similar claims by fifty-one other handlers, and reversed both of the ALJ's decisions. In a voluminous two-part decision, the JO ruled in favor of the Secretary on all issues.

Over the course of these proceedings, the Secretary also brought a total of fifteen enforcement actions against the handlers pursuant to 7 U.S.C. § 608a(6) to compel payment of the assessments and compliance with the maturity standards. By order of the district court, all assessments due from 1987 to the present have been paid into a trust fund pending resolution of the handlers' claims.

Wileman, along with fifteen other handlers, sought review of the JO's decision in district court pursuant to 7 U.S.C. § 608c(15)(B). The Secretary's enforcement actions were consolidated with the handlers' civil case. On January 27, 1993, on cross-motions for summary judgment, the district court granted summary judgment to the Secretary. The district court also entered judgment for the Secretary for $3.1 million in past due assessments from the handlers. The handlers appeal.

II

The handlers challenge the generic advertising program administered under the marketing orders on the grounds that it (1) is arbitrary and capricious under the APA, (2) fails to abide by the notice and comment procedures of the APA, and (3) violates their First Amendment free speech

rights. We discuss each claim, as well as the relevant aspects of the generic advertising program, in turn.

In 1954, Congress amended the Act to permit the Secretary to promulgate marketing orders "providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order." 7 U.S.C. § 608(6)(I). Subsequently, the Secretary, through formal rulemaking, amended the marketing orders to authorize paid generic advertising programs for nectarines (1966), plums (1971), and peaches (1976). 7 C.F.R. §§ 916.45, 917.39. Ever since, the committees have developed the details of the generic advertising program—radio and TV commercials ("California nectarines are the juiciest"), newspaper inserts ("How to make a peach pie with California peaches"), etc.—and have included an advertising component in their annual budget recommendations. After approving the committees' budget recommendations, the Secretary issues annual assessment regulations, and the handlers are required to pay their pro rata share.[3] 7 U.S.C. § 610(b)(2)(ii).

The handlers first claim the annual assessment regulations are arbitrary and capricious because the Secretary has never justified the need for generic advertising, as opposed to brand-name specific advertising or no collectively-financed advertising at all. The handlers do not challenge the Secretary's original decision after formal rulemaking procedures to authorize a generic advertising program; rather, they claim the Secretary has acted arbitrarily and capriciously in failing to evaluate the benefits of generic advertising in order to determine whether it is worth

[3]For example, in 1992, nectarine handlers were required to pay $0.1825 per 25-pound package of nectarines they shipped. Of this, roughly 53% went to marketing expenses. 57 Fed. Reg. 45,559 (1992).

continuing. According to the handlers, the Secretary has simply rubberstamped the committees' recommendations.

Under the APA, we must analyze whether the agency's action is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). "When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test." *Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984); *see also Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991). Under the substantial evidence standard of review, we consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the agency's decision.[4] *Baxter*, 923 F.2d at 1394. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe*, 402 U.S. 402, 417 (1971).

The Secretary finds support for his annual assessment regulations and the continuation of the generic advertising program from two sources—the Secretary's own rulemaking records and the recommendations made by the committees. The formal rulemaking records accompanying the Secretary's original decisions to implement the paid advertising programs for nectarines, plums, and peaches are replete with evidence that supports his decision. The following is a typical excerpt:

[4]The ALJ's decisions are treated as part of the record. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir.), *cert. denied*, 464 U.S. 893 (1983). When the agency and the ALJ disagree, as they have in this case, we may give less deference to the agency's findings than they would otherwise receive. *Id.*

> The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued.
>
> ***
>
> Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions.

41 Fed. Reg. 14,375, 14,376-77 (1976). Indeed, the handlers concede that the Secretary's decision was supported by substantial evidence at its inception; it is its continuation that concerns them.

One need not be intimately familiar with the tree fruit industry to suppose that the wholesale and retail markets for fruit and the nature of media advertising have changed significantly in the past twenty years. Changed conditions should prompt the Secretary to revisit the generic advertising program at some point. After all, the Secretary is not passively allowing the generic advertising programs to continue in a vacuum, but is actively approving annual

budgets for particularized programs in a changing marketplace. Although the Secretary does not need to reinvent the wheel every year, the Secretary must have at least some relatively current information to rely upon. Otherwise, the advertising program, well-advised in its inception, might become arbitrary and capricious in its application.

Under the unique regulatory scheme of the Act, the Secretary may relay on the industry-led committees and their staff to do his homework for him and to provide up-to-date information. *See Riverbend Farms, Inc. v. Madigan,* 958 F.2d 1479, 1488 (9th Cir.) ("We have no difficulty with the Secretary's decision to rely on the [Navel Orange Administrative Committee] to filter and digest public comments and make a recommendation."), *cert. denied,* 113 S.Ct. 598 (1992). The Nectarine Administrative Committee and the Peach Commodity Committee engage in a careful process each year prior to and during their annual spring meetings in approving the advertising program for the upcoming season. Prior to the full committee meeting, the Subcommittee on Advertising and Promotion meets to review in detail the program developed by its staff. The staff in turn uses monthly reports on price trends, consumer interests, and general market conditions in the formation of the proposed advertising program.

In *Riverbend Farms,* 958 F.2d at 1488, this court upheld volume regulations in the navel orange marketing orders against a challenge by handlers that they were arbitrary and capricious. In adopting the regulations, the Secretary apparently relied entirely upon the recommendations of the Navel Orange Administrative Committee ("NOAC"). In response to the suggestion that the Secretary was merely rubberstamping the committees' work, the court stated: "Although the Secretary normally follows the NOAC's suggestions, he retains the authority to depart from or ignore them altogether." *Id.* The same is true here.

Although the Secretary has apparently always adopted the committees' budget recommendations, he retains the authority to reject them at any time under 7 U.S.C. § 608c(7)(C).

Finally, it is only because the handlers themselves, through the committees, recommend a budget with a generic advertising component that the program is renewed by the Secretary every year. In fact, in most years the recommendations have been unanimous. We cannot assume that the handlers—the parties with firsthand knowledge of the state of their industry—would make recommendations that have an adverse effect on their businesses. Of course, the interests of the voting committee members may not always coincide with those of every handler in the industry.[5] However, this court has previously noted that the Supreme Court "upheld the constitutionality of the system despite the fact that it may produce results with which some growers or handlers will disagree." *Saulsbury Orchard and Almond Processing, Inc. v. Yeutter*, 917 F.2d 1190, 1197 (9th Cir. 1990) (citing *United States v. Rock Royal Coop.*, 307 U.S. 533 (1939)).

We therefore conclude that the Secretary's annual assessment regulations for the generic advertising programs are not arbitrary and capricious.

III

The handlers next claim that the Secretary's annual assessment regulations are rules promulgated without opportunity for notice and comment in violation of the APA.

As noted above, the Act requires each handler to pay its pro rata share of the expenses of the marketing order. 7

[5]As we discuss below, the interests of the voting committee members may not always accord with the First Amendment rights of every handler in the industry either.

U.S.C. § 610(b)(2)(ii). The Nectarine Administrative Committee and the Research Commodity Committee hold open meetings each spring, at which a budget for the upcoming year is discussed and approved. All handlers are notified of the meetings and are free to attend. The proposed budgets are available to all handlers and the public, and comments may be submitted to the committees. After the budget is passed, the committees recommend the budget to the Secretary. From 1980 to 1987, the Secretary issued regulations approving the proposed budgets and setting the assessment rates without first publishing a proposed rule and without providing opportunity for comment. In 1988 and 1989, a ten-day comment period was provided. Since 1989, a thirty-day comment period has been provided.

As an initial matter, we must determine whether the regulations are indeed "rules" within the meaning of the APA. In *Cal-Almond, Inc. v. USDA*, 14 F.3d 429 (9th Cir. 1993), this court held that virtually identical assessment regulations adopted by the Secretary upon the recommendation of the California Almond Board were "rules" under the APA. The APA's definition of a "rule" includes, among other things, "the approval or prescription for the future of rates." 5 U.S.C. § 551(4). The almond marketing order defined the assessment, which was to be collected in the future, as a "rate per pound of almonds." 7 C.F.R. § 981.81(a) (1993). Thus, the court held, the assessment was a rule. *See Cal-Almond*, 14 F.3d at 441.

The same analysis applies to the marketing orders in the instant case. The peach marketing order permits the Secretary to establish a "rate of assessment which handlers shall pay with respect to each fruit." 7 C.F.R. § 917.37. The nectarine marketing order does the same. 7 C.F.R. § 916.41. Thus, the annual peach and nectarine assessments are "rules."

The *Cal-Almond* court proceeded, however, to hold that the Secretary's error in failing to provide for notice and

comment on the assessment regulations was harmless. *See* 14 F.3d at 442. "[T]he failure to provide notice and comment is harmless only where the agency's mistake clearly had no bearing on the procedure used or the substance of the decision reached." *Riverbend Farms,* 958 F.2d at 1487 (quotation omitted). The harmless error analysis "must therefore focus on the process as well as the result." *Id.* (quotation omitted). The *Cal-Almond* court pointed out that each almond handler was notified of the proposed assessment rate. At the California Almond Board's annual meetings, handlers and other interested parties were free to comment on the proposals. After approval by the committees, the proposed budget was submitted to the Secretary, who used the proposed rate every year in the final assessment regulation. Thus, the handlers were not prejudiced by the Secretary's failure to provide notice and comment because the committee process served as an adequate substitute. *See Cal-Almond,* 14 F.3d at 442. *See also Riverbend Farms,* 958 F.2d at 1487-88 (same holding with respect to weekly navel orange volume restrictions developed through similar procedures).

As discussed above, virtually identical procedures were used by the Nectarine Administrative Committee and the Peach Commodity Committee in the instant case to develop budgets under the nectarine and peach marketing orders. The handlers do not dispute that they were aware of the proposed budgets and were free to make written comments to the committees prior to their approval and recommendation to the Secretary. The handlers have not demonstrated that the procedures in this case were somehow less adequate than those in *Cal-Almond* or *Riverbend Farms.* Consequently, we hold that the Secretary's failure to provide notice and comment on the assessment regulations from 1980 to 1987 was harmless.

IV

The handlers next claim that the assessments for the generic advertising program force them to provide financial support for messages with which they disagree in violation of their First Amendment free speech rights.[6] The handlers also claim that their ability to disseminate advertising of their own is greatly curtailed by being forced to pay the assessments. The handlers believe that the advertising program helps their competitors more than it helps them, and that they can better spend their marketing dollars on their own.

The First Amendment right to freedom of speech includes a right not to be compelled to render financial support for others' speech. *Cal-Almond,* 14 F.3d at 435 (citing *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977)). This is also true when commercial speech is at issue. *See id.* The assessments implicate the handlers' First Amendment rights because they are compelled to provide financial support for particular messages—the generic ads—associated with a particular group—peach and nectarine handlers.

The First Amendment analysis in the instant case is largely governed by *Cal-Almond.* In *Cal-Almond,* this court held that the USDA's almond marketing order, which implemented a generic advertising program for almonds, violated handlers' First Amendment rights. Like the peach and nectarine marketing orders at issue here, the almond order imposed an assessment on almond handlers based on

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[6]The handlers identify two specific messages disseminated by the generic advertising with which they disagree—that "red is better," and that "all California fruit is the same." One handler identified a specific ad that he found objectionable due to its alleged subliminal sexual messages. The handlers also object to a promotional chart, financed by the assessments, listing the "Red Jim" variety of nectarine. The "Red Jim" is not a generic variety of nectarine but a proprietary one, the rights to which are owned by a member of the Nectarine Administrative Committee.

the volume of almonds they shipped. A substantial portion of the assessments were used to fund a generic pro-almond public relations program. The court determined that the infringement on the almond handlers' free speech rights should be analyzed under the test for restrictions on commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). *See Cal-Almond*, 14 F.3d at 436. Applying this test, the court held that the marketing program was unconstitutional. *See id.* at 437-40.

Under *Central Hudson*, restrictions on lawful, non-misleading commercial speech are evaluated under a three-part test.[7] First, the asserted government interest behind the restrictions must be substantial. Second, the restrictions must directly advance that interest. Third, the program must not be more extensive than necessary to serve that interest. *See Central Hudson*, 447 U.S. at 566. The USDA has the burden of justifying the program by presenting evidence sufficient to satisfy these requirements. *Edenfield v. Fane*, 113 S.Ct. 1792, 1800 (1993). We examine each prong in turn.

A

First, the Secretary claims that the government has a substantial interest in enhancing returns to peach and nectarine growers. *Cal-Almond* held that the government has a substantial interest in "stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry." *Cal-Almond*, 14 F.3d at 437. *See also United States v. Frame*,

[7]The speech undertaken through the generic advertising program falls squarely within the definition of "commercial speech." *See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986). Namely, it is aimed at increasing peach and nectarine sales. The handlers do not claim that any other type of speech is implicated.

885 F.2d 1119, 1134 (3d Cir. 1989) (government has substantial interest in salvaging the beef industry), *cert. denied*, 493 U.S. 1094 (1990). The handlers point to no reason why the government's interest in promoting peaches and nectarines is any less substantial than it is for almonds.

B

Second, the Secretary claims that the generic advertising program directly advances the government's interest in promoting the peach and nectarine growing industries. The program may not be sustained if it "provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 566. The burden is on the Secretary to present objective evidence to demonstrate that the program directly advances the government's interest. *Edenfield*, 113 S. Ct. at 1800.

The Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised. *Cal-Almond*, 14 F.3d at 439 (citing *Posadas*, 478 U.S. at 342). However, according to *Cal-Almond*, the question is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the "specific, targeted marketing efforts of individual handlers." *Id.* Because the almond handlers presented evidence that the assessments hindered their own advertising efforts, and because the Secretary could not provide evidence that the generic advertising program was more effective, the *Cal-Almond* court held that the generic

advertising program did not directly advance the government's interest.[8] The *Cal-Almond* court concluded:

> We agree with [the handlers'] argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual business person.

Id.

The same state of affairs pertains with respect to the generic advertising programs for nectarines and peaches. First, the handlers claim their own advertising efforts are being hampered. For example, appellant Kash, Inc. claims it benefits more from in-store promotions, and that it would devote more resources to such advertising if it did not have to contribute to the generic advertising program. Appellant Gerawan Farming, Inc. suggests that it would advertise its own label. Even if individual handlers were to utilize the same media as used by the generic advertising program, their effort would undoubtedly differ in the details. The larger handlers, such as Wileman and Kash, were required to contribute $50,000 or more towards the generic advertising program in some years. This is a significant sum of money that could have been used in their own marketing efforts.

Second, the handlers claim there is no evidence that generic advertising significantly benefits the tree fruit industry. Indeed, they point to the testimony of the

[8]In *Cal-Almond*, the court also noted that one large almond handler, Blue Diamond, may have been manipulating the advertising program for its own benefit. *See* 14 F.3d at 438-39. There is no evidence of such insider control of the committees here. Nevertheless, the question is not whether competitors on the committee are violating the handlers' First Amendment rights, but whether the *Secretary* is by imposing the assessments that fund the program.

Chairman of the Management Services Committee, who stated that although each year the industry pays more for the same amount of advertising, the growers' economic position has not improved.

The Secretary, however, claims there is evidence that demonstrates the efficacy of generic advertising. The Secretary suggests that the formal rulemaking record leading to the amendment of the marketing orders to implement the advertising program contains "extensive support." However, the rulemaking records merely recite that advertising will have a beneficial effect on tree fruit consumption. *See* 41 Fed. Reg. 14,375, 14,376-77 (1976); 31 Fed. Reg. 5635, 5636 (1966). This uncontroversial assertion, while belaboring the obvious, says nothing about whether mandatory, collectively-financed advertising is more effective than advertising undertaken by individual handlers (or even whether generic advertising is better than brand name advertising).

The Secretary also points to two studies located in the record before the ALJ—the Carmelita Enterprises Report and the NPD/Nielson Inc. Report. The handlers poke several methodological holes in the studies. Most importantly, the handlers claim the studies only demonstrate that advertising increases consumption—again, a rather uncontroversial proposition. The studies do not even discuss whether collectively-financed generic advertising is more productive than the advertising efforts of the marketplace left to its own endeavors.[9] Finally, the Secretary includes a chart in his brief showing that peach and nectarine production increased significantly in the 1980s. However, this chart provides no evidence as to causation; the increase may have been due to weather conditions or

[9]In fact, the Carmelita Enterprises Report notes that in-store point-of-purchase advertising may be better than generic television advertising. This is the type of advertising appellant Kash, Inc. claims it would utilize to a greater extent if it did not have to pay the assessments.

cultivation techniques as much as it was due to the generic advertising programs.

In sum, the Secretary has demonstrated that advertising increases consumption of peaches and nectarines but has not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individualized advertising, as *Cal-Almond* requires. Thus, the generic advertising programs for peaches and nectarines do not "directly advance" the government's interest and fail the second prong of the *Central Hudson* test.

C

Third, the Secretary claims that the generic advertising program is sufficiently narrowly tailored. The Secretary must show that the marketing program "employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

An obvious alternative to the mandatory, collectively-financed advertising program is a program like the one used under the Almond Marketing Order. The almond handlers had the option of seeking a credit (i.e. a reduction of their assessments) for their own authorized advertising endeavors. 7 C.F.R. § 981.41(c) (1993). The *Cal-Almond* court nevertheless found that the program was not narrowly tailored because the regulations denied credit for certain types of advertisements, such as advertisements promoting products with "competing nuts." 7 C.F.R. § 441(c)(5)(ii). By contrast, the peach and nectarine handlers do not even have the option of seeking a credit for their own advertising endeavors.

One objection to the implementation of a more narrowly tailored program is that a non-mandatory program would

give rise to free-rider problems. That is, non-paying handlers would free-ride on the benefits of a generic advertising program while spending their fair share of the assessments on their own advertising. *See Frame*, 885 F.2d at 1133-37 (noting that free-riders would be able to benefit from a collectively-financed beef marketing program if they were not required to pay the assessments). This argument is weak in the case of the peach and nectarine programs, however. First, the credited advertising option under the almond marketing program was more narrowly tailored and yet managed to avoid the problem of free riders; objecting handlers simply had to provide their own mode of transportation in the form of authorized advertising. Second, the handlers point out that there are thirty-three states that commercially handle peaches, and twenty eight that handle nectarines. Yet, California is the only state where handlers are subject to generic advertising assessments. If the Secretary is concerned about free-riders, there are already plenty of them in other states.

In short, the almond marketing program was less restrictive than the programs for peaches and nectarines; yet, the *Cal-Almond* court held that it was not narrowly tailored. Thus, the generic advertising programs for peaches and nectarines fail the third prong of the *Central Hudson* test as well.

In sum, although we agree that the Secretary has a substantial interest in promoting peaches and nectarines, we hold that forced contributions to pay for generic advertising programs contravene the First Amendment rights of the handlers. The generic advertising programs neither "directly advance" the government's interest nor are they narrowly tailored. They therefore fail the second and third prongs of the *Central Hudson* test and violate the First Amendment.

V

The handlers also challenge the fruit maturity regulations contained in the marketing orders. The Act authorizes the Secretary to regulate fruit by grade and quality in the marketing orders. 7 U.S.C. § 608c(6)(A). In theory, such quality restrictions maintain producer prices by indirectly limiting the quantity of fruit which may be shipped to market, and by excluding less desirable fruit which may depress the price of the entire crop. For several years, the maturity standard in the marketing orders for nectarines and peaches was determined by U.S. Grade 1. For nectarines, this required the fruit to be "mature but not soft or overripe ... [with] at least 75 percent of the nectarines in any lot [showing] some blushed or red color." 7 C.F.R. § 51.3147. After receiving complaints from customers, the tree fruit committees decided that the marketing orders should be amended to provide for a higher maturity level. The standard, which later became known as the "well-matured" standard, would be based on a test using a spectrum of color chips developed by the Federal-State Inspection Service, an agency within the USDA.[10]

In 1980, the Secretary amended the marketing orders to provide that fruit must grade at least U.S. No. 1 and that "maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." 45 Fed. Reg. 32,308 (1980) (interim final rule); 45 Fed. Reg. 42,252 (1980) (final rule). In 1988, the "well-matured" standard employing the color chip scheme was codified in the marketing orders. 53 Fed. Reg. 19,226, 19,232 (1988) (interim final rule) (codified at 7 C.F.R. §§ 916.356; 917,459).

[10]The maturity regulations for nectarines and peaches are slightly different in their wording and in the color chip schemes actually employed, but the handlers do not distinguish between them in their arguments.

In 1992, in response to complaints from handlers, the Secretary again modified the regulation by establishing a two-tiered maturity standard for nectarines and peaches. 57 Fed. Reg. 20,735 (1992) (interim final rule); 57 Fed. Reg. 42,681 (1992) (final rule). The minimum maturity standard is now "mature," and handlers may voluntarily seek the "well-matured" designation. The determination of whether fruit is "mature" is essentially the same as it was before the color chip scheme (i.e. U.S. No. 1). The color chip system is still used to determine if a fruit meets the "well-matured" standard. 7 C.F.R. §§ 916.356; 917.459.

The handlers claim the pre-1992 "well-matured" standard was arbitrary and capricious. They claim the use of color chips fails to determine the internal maturity of a fruit and discriminates against certain yellow varieties of nectarines that they grow. The handlers also claim that it is arbitrary to impose the same maturity requirements on fruit shipped great distances such as to the East Coast as are imposed on those shipped within California.

A

As a threshold matter, the district court held that the handlers' claims are moot because of the Secretary's 1992 revisions to accommodate "mature" fruit. Both the handlers and the Secretary now argue that the issue is not moot; however, we must consider this jurisdictional issue on our own account. *Majnas v. Superior Court*, 936 F.2d 1068, 1071 (9th Cir. 1991).

The handlers claim that, if we find the pre-1992 regulations to have been invalid for any reason, they are entitled to relief. As we discuss in Part VIII below, sovereign immunity bars the handlers' claims for consequential damages from the Secretary. However, it does not bar the refund of improper assessments. A significant portion of the handlers' assessments each year has gone to

the Federal-State Inspection Service to pay for inspection services, which include enforcement of the challenged maturity regulations.[11] Because the handlers might be entitled to a refund of the portion of their assessments that were used for improper regulations, there is a live controversy as to who is entitled to the assessment monies currently held in trust.

B

As an additional threshold matter, we also must determine whether the "well-matured" regulations were validly promulgated in 1980. If they were not, then we need only address the substance of the regulations as they were promulgated in 1988, at which point the Secretary re-promulgated the "well-matured" standard. 53 Fed. Reg. 19,226 (1988).

In *Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 336 (9th Cir. 1990), this court held that tree fruit committee members had not acted in accord with the marketing orders in promulgating the heightened maturity standards in 1980 and thus were not immune from suit in an antitrust action brought by several handlers. The court apparently looked to the regulation promulgated by the Secretary in May 1980, 45 Fed. Reg. 32,308 (1980), and determined that it did not clearly authorize the committees to promulgate and to enforce heightened maturity standards on their own. Rather, the "supplementary information" accompanying the regulation merely stated that "provision is made for a higher maturity standard," 45 Fed. Reg. 45,252 (1980), without stating *who* would promulgate it. The committee's subsequent maturity regulations implementing the color chip scheme had not been "recommended" to the Secretary as required by 7 C.F.R.

[11] For example, in 1992, nectarine handlers were required to pay $0.1825 per 25-pound package of nectarines they shipped. Of this, roughly 25% went to inspection services. 57 Fed. Reg. 45,559 (1992).

§ 916.52(a). The committee members' actions in promulgating the maturity standards were treated as being unauthorized, and thus were not entitled to immunity. *Giannini*, 909 F.2d at 336.

Contrary to the handlers' assertions, *Giannini* did not squarely hold that the maturity regulations were invalidly promulgated in 1980. Not only was *Giannini* primarily concerned with the issue of immunity from an antitrust suit, it was decided in the context of an appeal of a Rule 12(b)(6) dismissal for failure to state a claim. In the context of reviewing the dismissal, the court only reviewed the marketing orders themselves to see if the committee members were clearly authorized to promulgate the heightened maturity regulations. *Id.* at 335. The *Giannini* court could not resolve the ambiguity it found in the regulation promulgated by the Secretary and had to hold in favor of the plaintiffs. This court, because it is addressing the issue on the merits, can look beyond the marketing orders themselves to resolve any ambiguities that may exist. In so doing, it is clear that the Secretary intended to raise the maturity standards and to allow the committees to promulgate the implementing regulations, just as they had with numerous standards in the past. *See* 45 Fed. Reg. 32,308 (1980).

C

We turn now to the merits of the question of whether the Secretary's decision to adopt the "well-matured" regulation was supported by substantial evidence. *See Baxter*, 923 F.2d at 1394.

The rulemaking record surrounding the 1988 decision to promulgate the "well-matured" standard contains signifi-

cant evidence that supports the Secretary's decision.[12] The "supplemental information" accompanying the interim final rule reveals that the Secretary relied on a market study, performed by a marketing consultant, known as the Thuerk Report. 53 Fed. Reg. 19,226, 19,229 (1988). The Thuerk Report analyzed the results of meetings with 25 companies, representing 38.7% of the retail supermarkets in the nation. The Secretary summarized the Report as follows:

> With respect to maturity, the findings indicate that early season fruit which is picked immature does not provide satisfaction to the consumer and does not encourage repeat purchases, and does not benefit the market.

Id. at 19,229. The "supplemental information" also contains the findings of a pomologist (a fruit growing expert) from the University of California at Davis that "low maturity fruit tended to be more susceptible to bruising (especially vibration bruising), and also more susceptible to flesh browning following bruising." *Id.*

[12] As for the regulations in effect from 1980 to 1988, we note that the "supplemental information" accompanying the final rule states that "[t]his action is based upon the recommendations and information submitted by the Nectarine Administrative Committee." 45 Fed. Reg. 32,308 (1980). As discussed above, this court has previously held that the Secretary may rely on a committee recommendation to support a decision. *Riverbend Farms*, 958 F.2d at 1488. The handlers have pointed to no reason why the committee's decisionmaking process in recommending the heightened maturity standards in 1980 was flawed.

These were additional factors that might discourage repeat purchases.[13]

In sum, we are satisfied that the Secretary "indicate[d] the major issues of policy that were raised in the proceedings and explain[ed] why the agency decided to respond to these issues as it did." *Cal-Almond,* 14 F.3d at 445 (quotation omitted). We therefore hold that the "well-matured" standard—both as promulgated in 1980 and as re-promulgated by the Secretary in 1988—is not arbitrary and capricious.

VI

The handlers also challenge the fruit minimum size regulations contained in the marketing orders. The Act authorizes the Secretary to regulate fruit by size in the marketing orders. 7 U.S.C. § 608c(6)(A). In 1988, upon the recommendation of the Nectarine Administrative Committee, the Secretary promulgated regulations that increased the minimum size requirements for seventy-five varieties of nectarines. 53 Fed. Reg. 19,226 (1988) (interim final rule); 54 Fed. Reg. 12,419 (1989) (final rule). Subsequent regulations have made minor changes in the size requirements for several varieties of nectarines. The current minimum size regulations are codified at 7 C.F.R. § 916.356.

[13] The Secretary also acknowledged receiving negative comments on the maturity standard. To several of these comments, the Secretary simply answered that "the favorable comments and other information sufficiently refuted the unfavorable comments." 53 Fed. Reg. at 19,229. To others, he gave specific responses. For example, one handler apparently complained that the "well-matured" standard did not make sense for fruit shipped to the East Coast, an argument made by the handlers in the instant case. To this, the Secretary responded by pointing to the testimony of a buyer in Massachusetts who supported the standard. *See id.*

The handlers claim that the nectarine minimum size regulations are arbitrary and capricious.[14] The handlers contend that the regulations were promulgated for the impermissible purpose of volume control and discriminate against certain smaller varieties of nectarines. This court must determine whether the Secretary's decision to adopt the minimum size regulations was supported by substantial evidence. *See Baxter,* 923 F.2d at 1394.

As we noted above in the context of the annual assessment regulations, the Secretary may rely on the committees to make sound recommendations on fruit size regulations. *See Riverbend Farms,* 958 F.2d at 1488. The Nectarine Administrative Committee's deliberations resulted in the challenged minimum size regulations being recommended to the Secretary with the following justification:

> According to the committee, the proposed changes are necessary to remove from the market those sizes of fruit which are not being well received by consumers. These actions are intended to foster repeat purchase and maintain consumer satisfaction. Early season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases. According to the committee, increased size requirements are needed to make nectarines more marketable and are essential for the consumer satisfaction

[14] Although the handlers also refer to the minimum size regulations for peaches in their challenge, it appears that there was no change in the size requirements for peaches in 1988. 53 Fed. Reg. 19,234 (1988). Rather, the packing requirements were altered with an incidental, de minimis effect on the size requirements. 53 Fed. Reg. 12,692 (1988). The handlers have failed to make any specific challenge to the peach size regulations.

> needed to maintain current markets and to build new markets.

53 Fed. Reg. 12,687, 12,688 (1988).

The rulemaking record also reveals that the Secretary had substantial evidence to support his decision.[15] First, in response to a request for comments on the proposed regulations, the Secretary received numerous letters from growers and handlers in support of the proposed regulations. The general sentiment expressed in the letters was that consumers wanted bigger fruit, so that is what the growers and handlers should give them. 53 Fed. Reg. 19,226 (1988). Second, the Secretary relied on a market study known as the Thuerk Report that supported the proposed regulations. The Report concluded that "findings indicate that early season fruit which is small in size does not provide satisfaction to the consumer, does not encourage repeat purchases, and nor does it benefit the market [sic]." *Id.* at 19,227.

The rulemaking record also reveals that the Secretary addressed the negative comments that were received. There were several arguments against the standards. Most importantly, some handlers argued that the minimum size requirement would drastically reduce the total volume of fruit shipped. To this, the Secretary responded:

> The Department disputes the contention that the [minimum size] proposal would drastically reduce the volume of fruit shipped because the industry had recognized the fact that in past seasons small size nectarines have been a detriment to the trade and as

[15] The rulemaking record can be found in a "supplemental information" published along with the interim final rule, 53 Fed. Reg. 19,226 (1988), and in the statement published with the final rule, 54 Fed. Reg. 12,419 (1989).

> such the industry has directed its efforts toward production and marketing of better quality and larger sized fruit.

Id. at 19,227-28. The Secretary subsequently noted that the size regulations may have the opposite effect of that suggested by the handlers. Namely, evidence from the 1988 season demonstrated that "production volume and sales increased with the higher size requirements in effect."[16] 54 Fed. Reg. 12,419, 12,420 (1989).

The handlers make several additional arguments against the regulations. First, the handlers point out that the Secretary also proposed minimum size regulations for plums but dropped the proposal after receiving a large number of negative comments. Rather than reflect arbitrariness, however, this simply reflects the Secretary's responsiveness to the stronger opposition. The handlers also point out that the size regulations do not apply to all varieties of nectarines or peaches. This, the handlers argue, shows that the regulations are arbitrary, because consumers would be likely to reject *all* small nectarines not just small nectarines of certain varieties. However, the Secretary, in the statement accompanying the final rule, addressed this argument with the statement that "[d]ifferent size requirements for different varieties recognize varietal characteristics and market preferences." 53 Fed. Reg. 19,226, 19,227 (1988). Finally, the handlers cite evidence that fruit that fails to meet the minimum size standards nevertheless could be marketed. However, the very point of the regulation was to make sure California fruits were bigger and would thus gain the cachet in the consumer's mind of being big.

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[16] Some handlers also argued that the effective date of the new regulations was too soon and that growers would not be able to modify their cultivating practices in time. To this, the Secretary responded: "[A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit sizes." 53 Fed. Reg. 19,226, 19,228 (1988).

In sum, regardless of what the handlers may think of the policies underlying the minimum size regulations, the rulemaking record contains sufficient evidence and a plausible explanation from the Secretary. "So long as [the agency] explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary." *Riverbend Farms,* 958 F.2d at 1487. In this case, not only did the Secretary explain its decision to adopt the size regulations, but a significant number of handlers and growers seem to think it was a wise idea.

VII

The handlers claim the Act violates the nondelegation doctrine because it gives unguided authority to the Secretary to levy assessments. The district court suggested that the handlers are "fifty years too late in pressing an unlawful delegation claim." In fact, they are fifty-six years too late.

In *United States v. Rock Royal Co-operative, Inc.,* 307 U.S. 533, 574-77 (1938), back in the days when the nondelegation doctrine actually had some vitality, the Supreme Court rejected a similar nondelegation challenge to the Act on the ground that the "Declaration of Policy" section provided sufficient guidance to the Secretary in the development of marketing orders. This section enumerates such purposes as: maintaining orderly marketing conditions; maintaining an orderly flow of supply; promoting production research and marketing research; developing container and pack requirements; developing minimum quality and maturity requirements; and developing grading and inspection requirements. 7 U.S.C. § 602. The Secretary's authority to levy assessments to effectuate these orders is guided by the very same purposes. The Supreme Court has rejected the argument that a delegation of the power to tax (i.e. levy assessments) requires stricter limits

on an agency's discretion than a delegation of the power to develop regulations. *Skinner v. Mid-American Pipeline Co.*, 490 U.S. 212, 220-24 (1989). Thus, the authority to levy assessments on handlers is not an unconstitutional delegation of legislative authority.

VIII

The handlers seek two types of relief. First, the handlers seek unspecified money damages for the allegedly improper maturity and minimum size regulations. Because we uphold both sets of regulations, we need not address this request for relief. Even as to their First Amendment claim, the district court properly held that the handlers' requests are barred by the doctrine of sovereign immunity. In short, claims for money damages from the United States are barred unless the United States has waived its sovereign immunity. *United States v. Testan*, 424 U.S. 392, 401-02 (1976). There is nothing in the Act or the APA that demonstrates a congressional intent to waive sovereign immunity for the claims raised by the handlers.[17]

Second, the handlers seek a refund of the assessments levied from 1980 to 1986 and the release of the assessments paid into a trust fund from 1987 to the present and currently held by the Registry of the Court. Since they have prevailed on their First Amendment claim, we must evaluate this remedy. The district court held, and we agree, that the refund claims are not barred by sovereign immunity because they are an equitable action for the return of improper assessments.

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court drew a distinction between "an action at

[17]Under the Act, a handler's petition to the Secretary is limited to "stating that any [marketing] order ... is not in accordance with law and praying for a modification thereof or to be exempted therefrom." 7 U.S.C. § 608c(15)(A). There is no mention of money damages.

law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing ... for the recovery of specific property *or monies.*" *Id.* at 893 (emphasis added). The Court held that while the former type of claim could not be brought against the federal government, the latter, even if it required monetary payments, could. *See id. See also McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 20, 32-44 (1990).

The critical question, then, is whether the handlers' request that the improper assessments be returned to them is properly characterized as a claim for damages or as an equitable claim. In *Bowen*, the Supreme Court distinguished the two as follows: "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' " *Bowen*, 487 U.S. at 894-95 (quoting D. Dobbs, *Handbook on the Law of Remedies* 135 (1973)). *See also id.* at 914 (Scalia, J., dissenting) ("Whereas damages compensate a plaintiff for a loss, specific relief prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken ...."). Here, the handlers seek the return of the precise property that was wrongfully taken from them—the assessments levied in violation of their First Amendment rights. *Cf. Marshall Leasing, Inc. v. United States*, 893 F.3d 1096, 1099 (9th Cir. 1990) (holding that an action for recovery of specific property is an equitable action and is not barred by sovereign immunity). The fact that the property taken from the handlers was money does not alter its character as a specific remedy in this case. *See Bowen*, 487 U.S. at 893.

In addition, this court, on several occasions, has suggested that a refund of improper assessments is the

appropriate remedy for prevailing handlers. For example, in *Cal-Almond,* this court stated that "we have already held that a sufficient remedy for handlers who prevail in their administrative petitions is a refund of any assessments found not to have been due." 14 F.3d at 448 (citing *Saulsbury Orchards,* 917 F.2d at 1195). *See also United States v. Riverbend Farms, Inc.,* 847 F.2d 553, 559 (9th Cir. 1988) ("If the Secretary or courts (upon proper appeal) substantiated the challenge, the handler would be entitled to a refund."); *Navel Orange Admin. Comm. v. Exeter Orange Co.,* 722 F.2d 449, 452 (9th Cir. 1983). Indeed, in the prior appeal of the instant case, this court stated: "We have previously indicated, however, that a remedy would be available to ... handlers who ultimately prevail in their petitions." *Wileman Bros.,* No. 87-2938 (9th Cir. Oct. 29, 1990). In sum, principles of sovereign immunity do not bar a refund of the specific assessments that were taken from the handlers, a remedy which we have repeatedly indicated would be available.

We emphasize, however, that the handlers are only entitled to a refund of the assessments that were used for the generic advertising programs each year. Because of the fact-intensive nature of this remedial inquiry, we remand to the district court for computation of the refund amount. *See Cal-Almond,* 14 F.3d at 449. On remand, the district court may consider arguments regarding any assessments which were levied under the generic advertising programs.

IX

For the above reasons, we hold that the three regulations at issue—generic advertising, "well-matured," and minimum size—are not arbitrary and capricious or otherwise in violation of the Administrative Procedure Act. However, we hold that the generic advertising assessments do indeed violate the handlers' First Amendment rights. We therefore

remand to the district court to fashion an appropriate remedy consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED. Each party shall bear its own costs.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16977
D.C. No. CV-90-00473-OWW
ORDER

WILEMAN BROTHERS & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.;

AND

MIHARA FARMS, *Plaintiffs-Appellants,*

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
Defendant-Appellee.

Filed October 3, 1995

Before: THOMAS TANG,* DIARMUID F. O'SCANNLAIN, Circuit Judges; ROBERT R. MERHIGE, JR.,** District Judge.

ORDER

The Order and Amended Opinion filed on September 18, 1995 at slip op. 11753 is further amended as follows:

Slip op. 11759: Delete the last two full paragraphs of the order.

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*Due to the death of Judge Tang on July 18, 1995, the petitions for rehearing were voted upon only by Judges O'Scannlain and Merhige. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

**The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-16977
D.C. No. CV-90-00473-OWW

WILEMAN BROTHERS & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.;

AND

MIHARA FARMS, *Plaintiffs-Appellants,*

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
Defendant-Appellee.

Filed October 17, 1995

ORDER

Before: TANG,* O'SCANNLAIN, Circuit Judges; MERHIGE,** District Judge.

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*Due to the death of Judge Tang on July 18, 1995, the petitions for rehearing were voted upon only by Judges O'Scannlain and Merhige. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

**The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The panel has voted to deny the petitions for rehearing. Judge O'Scannlain voted to reject the suggestion for rehearing en banc, and Judge Merhige so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-90-473-OWW

CONSOLIDATED WITH
CV-F-88-568-OWW
CV-F-87-392-OWW
CV-F-90-088-OWW
CV-F-91-381-OWW
CV-F-91-319-OWW

WILEMAN BROS. & ELLIOTT, INC.; AND KASH, INC.,
Plaintiffs,

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE,
Defendant.

MODIFIED MEMORANDUM OPINION AND ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

On March 13, 1992, the Court heard the parties' cross-motions for summary judgment. Upon due consideration of the written and oral arguments of the parties and the administrative record, the Court now enters its order granting defendant's motion for summary judgment.

Plaintiffs are growers and handlers of nectarines, plums and peaches. Acting under 7 U.S.C. § 608c(15)(B), plaintiffs have filed a complaint seeking review of the Secretary of Agriculture's dismissal of their action

challenging Marketing Orders 916 (regulating the handling of nectarines) and 917 (regulating the handling of pears, plums and peaches), promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA of "the Act"), 7 U.S.C. § 601, *et seq.*

Two separate administrative proceedings are involved. Pursuant to 7 U.S.C. § 608c(15)(A), plaintiff Wileman Bros. and Elliott, Inc., initially filed a petition with the U.S.D.A. on April 20, 1987 ("Wileman I").[1] This action, later joined by plaintiff Kash, Inc., challenged the validity of the marketing orders from 1980-1987. A second petition, initially filed on June 6, 1988, challenged the marketing orders as amended in 1988 ("Wileman II").[2] The petitions were considered independently of each other by Administrative Law Judge ("ALJ") Dorothea A. Baker, who found in favor of plaintiffs. Judicial Officer Donald A. Campbell consolidated the cases and reversed ALJ Baker's decisions on appeal.

The parties agree that there are no material facts in dispute, and that this action is appropriate for summary judgment.

By prior order of the Court, plaintiffs have been paying assessments required by the marketing orders into a trust fund account pending the outcome of these motions.

I. BACKGROUND

Congress passed the AMAA "to establish and maintain such orderly marketing conditions for agricultural commodities" as will establish "parity prices" for those

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[1] AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3. All citations to the administrative record are herein referred to by either Wileman I or II, followed by the number of the part of the record, and the page or exhibit number. The administrative record in Wileman I consists of 42 parts; Wileman II consists of 74 parts.

[2] AMA Docket Nos. F&V 916-3 and 917-4.

commodities. 7 U.S.C. § 602(1). The Act authorizes the Secretary to issue marketing orders for certain commodities including fruits such as nectarines, peaches and plums. 7 U.S.C. § 608c(2)(A).

The Secretary may issue marketing orders upon a finding that the order "will tend to effectuate the declared policy of the Act,"[3] after providing adequate notice and hearing, as defined under the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et.seq.* 7 U.S.C. § 608c(3), (4). Additionally, the marketing orders must be approved by either two-thirds of affected producers, or by producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. § 608c(9)(B).

Marketing order may contain terms:

> [l]imiting, or providing methods for the limitation of, the total quantity of any such commodity or product or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce ...

7 U.S.C. § 608c(6)(A).

Under the AMAA, marketing orders are implemented by committees composed of members of the affected industry. 7. U.S.C. §§ 608c(7)(C), 610. Members of the committees are appointed by the Secretary, serve without compensation and are subject to removal at any time by the Secretary. 7 C.F.R. §§ 916.23, 916.62, 917.25, 917.30. Based on

[3]While the Act authorizes the Secretary to enter into marketing "agreements" with handlers, 7 U.S.C. § 608b, the Secretary may also issue marketing "orders" which are binding on handlers even where the handler does not wish to be a party to an "agreement." 7 U.S.C. § 608c(3), (4), (6) and (9).

comments received from members of the industry, the committees make recommendations to the Secretary and administer the Secretary's orders subject to the review and approval of the Secretary. 7 U.S.C. § 608c(7)(C); 7 C.F.R. §§ 916.30, 917.33. "Each and every regulation, decision, determination or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time." 7 C.F.R. §§ 916.62; 917.30. Committee members are entitled to immunity from antitrust liability to the extent that their actions have been authorized by the AMAA. 7 U.S.C. § 608b; *Wileman Bros. & Elliott, Inc. v. Giannini,* 909 F.2d 332, 335 (9th Cir. 1990).

Marketing Order 916, which regulates the handling of nectarines, was promulgated by the Secretary in 1958. 23 Fed. Reg. 4616 (June 25, 1958). Marketing Order 916 is administered by the Nectarine Administrative Committee, consisting of eight members appointed by the Secretary. 7 C.F.R. § 916.20.

Marketing Order 917 was issued in 1939 to regulate the handling of pears, plums and peaches grown in California. 4 Fed. Reg. 2135 (May 26, 1939). Those portions of the order affecting pears are not at issue here. The plum portion of Marketing Order 917 was terminated as of September 12, 1991. Marketing Order 917 is administered by a Control Committee consisting of 25 members selected by the Secretary. 7 C.F.R. §§ 917.16-19. A separate committee administers the marketing order for each of the commodities. 7 C.F.R. § 917.20. The Peach Commodity Committee is still in existence, while the Plum Commodity Committee ceased to exist when the plum marketing order was terminated.

II. STANDARDS AND SCOPE OF REVIEW

7 U.S.C. § 608c(15)(A) permits any handler subject to an order to petition the Secretary for its modification or an

exemption. After a mandatory hearing before an Administrative Law Judge, administrative appellate review is afforded by the Judicial Officer of the Department of Agriculture. The Secretary's decision, as made by the Judicial Officer, "shall be final, if in accordance with law." 7 U.S.C. § 608c(15)(A). The handler may appeal the Secretary's ruling to the appropriate district court, which, if it determines that the Secretary's ruling is not in accordance with law, "shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires." 7 U.S.C. § 608c(15)(B).

Judicial review requires a two-step analysis of the Secretary's decision. The court must first determine whether the Secretary's decision is based on "substantial evidence." 5 U.S.C. § 706(2)(E). As outlined in *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 315-316 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969):

> The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing, is not a *de novo* fact finding process. It is limited to a determination of whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence. If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity of the agency's ruling. (citations omitted).

Substantial evidence is "more than a scintilla. It means such relevant evidence as a reasonable mind might accept

as adequate to support a conclusion." *Richardson v. Perales,* 402 U.S. 389, 401 (1971), *quoting, Consolidated Edison Co. V. N.L.R.B.,* 305 U.S. 197, 229 (1938). Where the Secretary's determinations turn on purely legal questions concerning the requirements of the applicable statutes, they are reviewed *de novo. Desir v. Ilchert,* 840 F.2d 723, 726 (9th Cir. 1988).

The court must also analyze whether the Secretary's decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). "To make this finding, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29, 43 (1983).

The standard does not change where, as here, the administrative agency disagrees with the conclusions of its

ALJ.[4] The ALJ's findings are part of the record to be weighed against other evidence. *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983). The weight accorded the ALJ's findings is greatest where credibility based on witness demeanor is at issue. With respect to derivative inferences, however, the reviewing court's deference is to the agency and not to the ALJ. *Stamper v. Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984).

The parties cannot agree as to what evidence should properly be reviewed in this § 608c(15)(B) proceeding.[5]

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[4]Plaintiffs contend that no deference should be afforded the findings of the Judicial Officer as he is not a neutral magistrate. They allege that he has a history of merely "rubber-stamping" ALJ rulings which favor the Secretary, while consistently reversing those rulings which are unfavorable. They further allege that in this case, the Judicial Officers' decision is a "regurgitation of U.S.D.A. counsel's appellate brief choreographed to ensure victory for U.S.D.A." in which he "manipulated and distorted facts to fit a preconceived result." Plaintiffs devote 25 pages of their brief to outlining instances of the Judicial Officer modifying or deleting the findings of the ALJ.

To the extent that the Judicial Officer's rulings are arbitrary and capricious or were made in the absence of substantial evidence, it is the duty of the reviewing court to find that they are not in accordance with law. Nothing more is required as plaintiffs have not demonstrated that the Judicial Officer was impermissibly biased as a matter of law. The allegations and case citations submitted by plaintiffs do not establish the clear evidence required to overcome the presumption that a public officer has properly discharged his official duties. *See American Federation of Government Emp. v. Reagan*, 870 F.2d 723, 727 n.33 (D.C. Cir. 1989).

[5]The same issue arose in the administrative adjudication, although the parties adopted different positions than they now take. The government contended that in a § 608c(15)(A) proceeding the decisionmakers are to look only at the information in front of the Secretary at the time rulemaking occurred. It argued that no new facts should be introduced in the administrative trial, and to the extent it was, it should play no part in either the decision of the ALJ or the Judicial Officer. The Judicial Officer agreed that the ALJ erred in allowing plaintiffs to introduce new evidence, holding that "[i]t is well settled that the lawfulness of a Marketing Order or a provision thereof or a regulation issued thereafter must be judged by the facts contained in the formal or informal hearing record, rather than by facts petitioners would seek to introduce at a § 608c(15)(A) hearing." Wileman II, Judicial Officer's Opinion at 47. The Judicial Officer is correct in stating that courts have upheld the Secretary's decision to exclude new evidence in a 15(A) hearing. *See Dairymen's League Coop. Ass'n v. Brannan*, 173 F.2d 57, 66 (2d Cir.), *cert. denied*, 338 U.S. 825 (1949); *United States v. Mills*, 315 F.2d 828, 836 (4th Cir.), *cert. denied*, 374 U.S. 832 (1963).

The government argues that under the unique statutory scheme of the AMAA, the reviewing court is to look not only at the rulemaking record, but at the much broader record developed in the administrative trial before the ALJ. Plaintiffs contend that the record which must be reviewed is limited to Administrative Trial Exhibits 31, 32, 33 and 297, which the parties stipulated constituted the entire rulemaking record.

The law is unclear. The government provides no authority for its position, while plaintiffs cite *U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 534 (D.C. Cir. 1978), which stands for the settled proposition that only information included in the administrative record may be relied on by the agency during judicial review. The case does not define the composition of the administrative record, where, as here, an administrative rulemaking record exists separate from the 15(A) proceedings record before the ALJ.

The AMAA is a unique statute which prevents direct judicial review of the Secretary's regulations, a right plaintiffs would otherwise have. The court is prohibited from ruling on the legality of agency regulations, but must rule on the adequacy of the Secretary's determination that his own regulations are valid. 7 U.S.C. § 608c(15)(B). It is unnecessary to decide this issue. Although the entire record certified by the Secretary has been fully reviewed, sufficient evidence exists in the four trial exhibits which the parties stipulated constitute the entire rulemaking record to resolve all matters in contention in this § 608c(15)(B) proceeding.

III. DISCUSSION

Plaintiffs' First Amended Complaint seeks an order declaring the Secretary's Final Decision and Orders are not in accordance with law. Marketing orders 916 and 917 were substantially revised in 1988, 1991 and 1992. Much of the Judicial Officer's decision is therefore now moot. *Accord Wileman Bros. & Elliott, Inc., v. Yeutter,* 87-2938, unpublished opinion of October 29, 1990, at 10 n.3 (9th Cir.) (noting plaintiffs' argument as to procedural flaws in promulgation of maturity standards moot due to promulgation of new maturity regulations in 1988). Review of the decision is limited to the portions of Marketing Orders 916 and 917 which are still operative, and those portions no longer in existence but under which monetary relief could be granted.

A. *Plaintiffs' Right to Monetary Awards*

1. *Recovery of Damages for Destroyed or Seized Fruit*

Plaintiffs allege they have lost five million dollars as the result of the seizure and destruction of fruit which failed to meet the maturity and size standards established in the marketing orders.[6] Plaintiffs allege in this action, as well as in an ongoing antitrust suit against members of the committees, that heightened maturity, *i.e.,* ripeness, standards were unlawfully implemented. They contend that in 1980 the committees issued decrees barring the sale of

[6]Plaintiffs' complaint alleges only that the maturity regulations resulted in financial loss. They now contend in their motion for summary judgment that the size regulations also caused loss. Plaintiffs advance other claims in this motion not alleged in their complaint. The government has responded to these claims. When deciding a summary judgment motion a court may evaluate not just the issues pleaded but those which can reasonably be raised in an amended pleading. *In re Zweibon,* 565 F.2d 742, 748 n.20 (D.C. Cir. 1977); *National Agr. Chemicals Ass'n v. Rominger,* 500 F. Supp. 465, 473 (E.D. Cal. 1980). All of plaintiffs' claims have been considered.

fruit which was not "well-matured." The previous minimum maturity requirement was "mature." In order to enforce the heightened standard, a system of color chips and descriptive tables was developed, in which it was necessary for handlers to demonstrate that their fruit was the color of typically well-matured fruit of that particular variety.

In 1988, the "well-matured" standard was codified in the marketing orders, however, plaintiffs allege that the rulemaking process was in contravention of the APA. In 1988, the Secretary also issued rules barring the sale of smaller sized nectarines, peaches and plums. Plaintiffs contend that the promulgation of these rules was also procedurally flawed. Plaintiffs allege that the Secretary's enforcement of these requirements forced them to discard up to fifty percent of their tree fruit crops in some years.

Plaintiffs seek monetary recovery from the Secretary on two bases: (1) consequential damages for forced compliance with rules promulgated in contravention of the APA; (2) unlawful taking of their fruit without just compensation under the Fifth Amendment.[7] As to the consequential damages claims, without a waiver of sovereign immunity by the United States, plaintiffs cannot recover monetary damages. *See United States v. Testan,* 424 U.S. 392, 401-02 (1976) ("Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim whether it be the Constitution, a statute, or a regulation does not create a cause of action for money damages unless . . . the basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal

[7]To the extent that plaintiffs' first amended complaint raises a parallel taking clause claim regarding assessments imposed to fund the committees' operations, the claim has been abandoned. Nowhere in plaintiffs' voluminous briefs was the issue raised, even though the government refuted the validity of the claim in its opening brief.

Government for the damage sustained'" *quoting Eastport S.S. Corp. v. United States,* 372 F.2d 1002, 1008-09 (Ct. Cl. 1976)). "[T]he United States has not waived its sovereign immunity with respect to liability for consequential damages caused by invalid marketing orders." *Cal-Almond, Inc. v. Yeutter,* 756 F. Supp. 1351, 1356 n.2 (E.D. Cal. 1991). Neither the AMAA nor the APA provide a waiver of sovereign immunity so as to permit plaintiffs to recover monetary damages against the United States.[8]

This Court also lacks jurisdiction to consider a taking claim. As explained in *McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 590 (9th Cir. 1983), *cert. denied,* 469 U.S. 880 (1984):

> There is district court jurisdiction for civil actions against the United States, such as a taking claim, only if the damages sought do not exceed $10,000. 28 U.S.C. § 1346(a)(2). Because appellants contend that each claim against [appellee] amounts to at least $5,000,000 . . . jurisdiction would lie not with the district court, but with the United States Claims Court, 28 U.S.C. § 1491.

See also Ruckelshaus v. Monsanto Co., 467 U.S. 986,1020 (1984) ("Once a taking has occurred, the proper forum for [plaintiff's] claim is the Claims Court").[9]

[8]Plaintiffs also seek consequential damages against the Secretary resulting from the alleged actions of the members of the committees, as his agents, in creating and maintaining the Tree Fruit Reserve in violation of federal and state antitrust law. Sovereign immunity bars this claim.

[9]To the extent that plaintiffs argue that the taking occurred because of the illegal actions of the Secretary, *i.e.,* he enforced rules which were never validly promulgated, they appear to lack a cause of action in the Claims Court also. *See Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053 (1987) ("The Tucker Act suit in the Claims Court is not, however, available to recover damages for unauthorized acts of government officials.") Yet the potential lack of an alternate forum has no bearing on the fact that the United States has not waived its sovereign immunity for a claim of consequential damages.

Plaintiffs suggest that under the AMAA, this Court has jurisdiction to determine whether or not a taking occurred, while the Claims Court could later determine the amount of recovery. Plaintiffs cite no authority for the proposition that the issues of liability and damages can be bifurcated in such a manner.[10] Allowing plaintiffs to seek partial adjudication of their taking claim in district court would circumvent the jurisdictional limits of the Tucker Act, 28 U.S.C. § 1491.[11]

2. *Recovery of Assessments*

Plaintiffs seek the refund of assessments which they paid from 1980 to the present.[12] The expenses to administer the marketing orders are funded through assessments imposed on handlers based upon the volume of fruit they ship. 7 U.S.C. § 610(b)(2)(ii). The committees are required to submit budgets to the Secretary, along with a recommendation as to the rate of assessment for the year. 7 C.F.R. §§ 916.31(c), 917.35(f). Expenses fall into four categories;

[10]The single authority that plaintiffs cite, *Galloway Farms, Inc. v. United States,* 834 F.2d 998 (Fed. Cir. 1987), holds that jurisdiction is proper only in the Claims Court. *Id.* at 1000. It does not suggest that a district court can decide liability issues if it lacks jurisdiction. If plaintiffs cite to the case as authority for the judicial system's dislike of bifurcation (*e.g.,* bifurcating the taking claim from the rest of plaintiffs' claim), such a procedure would waste judicial resources by requiring two courts to try most aspects of the claims.

[11]Plaintiffs have not requested a transfer of these claims to the Claims Court via 28 U.S.C. § 1631.

[12]Plaintiffs seek the refund of assessments levied from 1980 through 1986 and the release of funds maintained in a trust account equal to the assessments levied from 1987 to the present. On July 6, 1989, the Honorable Edward D. Price ordered plaintiffs' assessments from the years 1987 and 1988 placed in a trust fund. The parties stipulated on February 23, 1990, that future assessments also would be placed in the trust fund until this litigation is resolved.

administration costs, inspection services, research, and the largest of the four, advertising and promotion. The Secretary then makes a final decision, in the form of a rule, as to the committees' budgets and the assessment rates to be imposed.[13]

The government argues that, as with the claims for money damages discussed above, the doctrine of sovereign immunity bars recovery of these assessments regardless of the merits of plaintiffs' claims. The Supreme Court's holding in *Bowen v. Massachusetts*, 487 U.S. 893 (1988), demonstrates that the claim for recovery of assessments cannot properly be characterized as one for imposition of monetary damages against the United States. *Bowen* involved a state's attempt to be reimbursed for Medicaid payments originally paid by the federal government. On appeal, the federal government argued the district court lacked jurisdiction to hear the state's claim, as it was not an action "seeking relief other than money damages." *Id.* at 891. The Court rejected that argument, holding that "the monetary aspects of the relief that the States sought are not 'money damages' as that term is used in the law." *Id.* at 893.

> Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which

[13]For instance, on October 2, 1992, the Secretary published a final rule setting assessment rates for California nectarines and peaches. 57 Fed. Reg. 45559 (1992). He adopted the budget and assessments of both committees. The nectarine committee set a total budget for 1992-93 at $4,106,247. $569,940 was designated for administrative expenses, $1,009,085 for inspection costs, $125,322 for research and $2,192,400 for marketing development. An assessment rate of $0.1825 per 25-pound package was imposed. *Id.*

> may include an order providing . . . for "the recovery of specific property *or monies.*" . . . The fact that a judicial remedy may require one party to pay money damages to another is not a sufficient reason to characterize the relief as "money damages."

Id. (citations omitted) (emphasis in original).

Plaintiffs cannot recover for losses in the form of consequential damages because the United States has not consented to be liable for plaintiffs' injuries to their property. However, equitable relief can be fashioned requiring "the recovery of specific monies." Where such equitable relief is appropriate, the purpose is not to compensate for injuries suffered, but to return property to its rightful owner. As the Court concluded in *Bowen*, a congressional bar on the award of "monetary damages" is not the same as prohibiting the grant of "monetary relief." *Id.* at 896.[14]

The Ninth Circuit has expressed the same view. In refusing to excuse plaintiffs from the requirement that they exhaust their administrative remedies, the Ninth Circuit rejected plaintiffs' argument that even if they were to prevail in the administrative proceedings they could not obtain a refund. *Wileman Bros. & Elliott, Inc., v. Yuetter*, 87-2938, unpublished opinion of October 29, 1990, at 9 (9th Cir.). The court stated, "We have previously

[14]*See also Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990) (claim seeking return of automobile forfeited pursuant to 21 U.S.C. § 881 cognizable under APA); *Zellous v. Broadhead Assoc.*, 906 F.2d 94, 98 (3rd Cir. 1990) (claim seeking reimbursement of utility payments made to HUD cognizable under APA); *Northern Cheyenne Tribe v. Lujan*, 804 F.Supp. 1281, 1287-88 (D. Mont. 1991) (claim seeking return of rental and bonus payments made to federal government cognizable under APA); *Sterling v. United States*, 749 F.Supp. 1202, 1207 (E.D.N.Y. 1990) (claim seeking return of money seized by DEA agents cognizable under APA); *Sarit v. Drug Enforcement Admin.*, 759 F.Supp. 63 68 (D.R.I. 1991) (same).

indicated, however, that a remedy would be available to nonmilk handlers who ultimately prevail in their petitions." *Id.* The identical language was used in *Saulsbury Orchards & Almond Processing, Inc. v. Yeutter,* 917 F.2d 1190, 1195 (9th Cir. 1990); and in *Naval Orange Admin. Committee v. Exeter Orange Co., Inc.,* 722 F.2d 449, 452 (9th Cir. 1983), the court stated:

> If the ultimate determination of the administrative proceeding, emanating either from the Secretary of Agriculture or from the federal courts through the statutory right of appeal, should substantiate [the handler's] challenges to the marketing orders, then refund of any paid assessments found not to have been due would be in order.

See also United States v. Riverbend Farms, Inc., 847 F.2d 553, 559 (9th Cir. 1988) ("We are satisfied that the district court, upon proper application, can shape relief to protect the handler's rights in case any challenge to the marketing order is ultimately substantiated").

The government has not suggested that section 704 of the APA prevents these issues from being decided. Section 704 bars a district court from reviewing an agency action when there is an adequate remedy in another forum. *See, e.g., Bowen* at 903. Such a potential remedy is a suit for money damages in the Claims Court, *i.e.,* the equitable claim seeking recovery of the assessments would be transformed into a claim for money damages equal to the amount of the assessments. *See Marshall Leasing,* 893 F.2d at 1100 (district court properly refused to hear plaintiffs' equitable claim for recovery of seized automobile based on taking clause grounds because adequate remedy at law for money damages in Claims Court). "A court must examine two factors in determining whether an

adequate remedy at law exists: whether monetary relief would be adequate if received and whether there is a forum in which the claim for relief can be heard." *Id.* The first requirement is not at issue here, but the second is.

Although not clearly stated, plaintiffs' complaint and cross motion for summary judgment seek recovery of assessments on four grounds: the invalidity of the rule establishing assessments due to procedural flaws in its promulgation; the First Amendment; the implied equal protection guarantee of the Due Process Clause of the Fifth Amendment; and an unlawful delegation of congressional authority. It is necessary to determine whether the Claims Court has in the past refused to exercise jurisdiction over any such claims. If it has, it is not an adequate forum. *See Bowen,* 487 U.S. at 905.[15]

The Claims Court has rejected claims seeking monetary damages based on the First Amendment and the Due Process Clause of the Fifth Amendment. *United States v. Connolly,* 716 F.2d 882, 887 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1065 (1984); *Marshall Leasing,* 893 F.2d at 1101. In the 1960's, the Claims Court apparently exercised jurisdiction in summarily rejecting two unlawful delegation claims on the merits. *See Grymes Hill Manor Estates v. United States,* 373 F.2d 920 (Cl. Ct. 1967); *Norman v. United States,* 392 F.2d 255 (Cl. Ct. 1968), *cert. denied,* 393 U.S. 1018 (1969). If the same test used by the Claims Court in *United States v. Connolly,* were applied, however, an unlawful delegation claim cannot survive. Jurisdiction in the Claims Court is proper only if the constitutional provision "can fairly be interpreted as mandating compensation for the damages sustained." 716 F.2d at 886, *quoting, United States v. Mitchell,* 463 U.S. 206, 217 (1983). Article 1, section 1 of the Constitution does not mandate monetary compensation.

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[15]It is unnecessary to analyze the Claims Court's jurisdiction to hear the procedural invalidity claim, as the District Court has jurisdiction over that claim under 7 U.S.C. § 608c(15)(B).

B. *Effect of Recent Amendments to the Marketing Orders*

Marketing Orders 916 and 917 have undergone major changes since plaintiffs filed their administrative actions. This is particularly true of the issues raised in Wileman I. Many of the regulations complained of no longer exist. The most basic change is the elimination of the rules regulating plums. On September 16, 1992, the Secretary issued a final rule establishing a two-tiered maturity standard for nectarines and peaches. 57 Fed. Reg. 42681 (1992). The minimum maturity standard was lowered to "mature." Handlers may voluntarily seek the designation of "well matured." This higher grade classification is "intended to help handlers of well matured fruit to realize any price premiums which such fruit may bring." *Id.*

The regulatory language describing the method of determining whether the tree fruit is "mature" is very similar to that used from 1980 through 1987.[16] Peaches must "meet the requirements of U.S. No. 1 grade" but the "Federal or Federal-State Inspection Service shall make final determinations on maturity through the use of color chips or such other tests as determined appropriate by the inspection agency." 57 Fed. Reg. 20735 at 917.459(a)(1).[17]

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[16]The new nectarine regulations contain additional requirements regarding scarring. They are not at issue here.

[17]The regulations for nectarines are nearly identical. The term "color guides" is substituted for "color chips." § 916.356(a)(1).

One issue that is not entirely moot is any contention that *any* use of color chips to determine maturity is arbitrary and capricious. The new regulations continue to allow the inspection services to determine maturity based on the use of color chips. In their reply brief, however, plaintiffs concede that "with respect to many varieties the use of color chips will likely provide a fair range of maturity." Plaintiffs instead protest that color chips are an ineffective method of determining the maturity of several red and yellow varieties of nectarines. It is unnecessary to reach the question of whether the use of color chips as to specific varieties of fruit is arbitrary and capricious. There is no

Adoption of the two-tiered classification system appears to address plaintiffs' complaints about the current system. They have argued that consumers, particularly those in locations far from California, would prefer to buy fruit which was less ripe when it left the handlers' facilities. The new system allows them to do so. Most importantly, plaintiffs are no longer forced to destroy fruit which is not well matured. Plaintiffs will not be prejudiced by a voluntary well matured standard. Consumer willingness to pay a premium for well-matured fruit will determine the efficacy of the standard in the marketplace.

In 1992, the Secretary also revised the rules governing the adjudication of requests to depart from the maturity guidelines. The 1988 regulations gave subcommittees of each commodity committee, the power to approve all variances. Growers or handlers denied variances by these maturity subcommittees could appeal to a committee made up of chairpersons of the other two commodity committees and the supervisor of the Federal-State Inspection Service (FSIS). Plaintiffs contend that the participation by competitors on these committees denies them their due process right to have the variance adjudicated by an impartial tribunal. The new regulations entrust the determination of maturity variance requests to the FSIS, rather than committee members. 57 Fed. Reg. 20735 (1992) at 916.356(a)(1)(ii); 917.459(a)(1)(ii).

C. *Mootness*

Adoption of new regulations moots the claims for declaratory relief as to expressly or impliedly repealed

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evidence that the Federal-State Inspection Service intends to apply color chips to every variety in determining whether it meets the lower grade of "mature," nor is it required by regulation to do so. The new rules indicate that the stringent color chip system in place prior to 1992 will not apply to fruit for which a grade of "mature" is sought. This system is reserved for fruit to be graded "well matured."

regulations. As to nectarines, procedural claims regarding size regulations, as well as claims seeking recovery of assessments based on alleged violations of the APA and the Constitution remain. As to peaches and plums, only plaintiffs' claims based on recovery of assessments remain.

D. *Minimum Size Regulations of Nectarines*

Of the issues which remain in controversy, the first concerns regulations promulgated in 1988 increasing minimum size requirements for nectarines. *See* 7 C.F.R. § 916.356. The AMAA expressly authorizes regulation of fruit by size. 7 U.S.C. § 608c(6)(A). Similar authorization is found in Marketing Order 916. 7 C.F.R. § 916.356. The 1988 regulations increased minimum size requirements for 75 specific varieties of nectarines. 53 Fed. Reg. 19225 at 19228 (1988). Subsequent regulations have made minor changes in requirements by variety. *See* 54 Fed. Reg. 27856 (1989); 55 Fed. Reg. 24215 (1990); 56 Fed. Reg. 40220 (1991); 56 Fed. Reg. 45884 (1991); 57 Fed. Reg. 27348 (1992); 57 Fed. Reg. 42681 (1992). Plaintiffs allege that the nectarine size regulations as promulgated in 1988 violate the APA in that they are arbitrary and capricious and were promulgated without the Secretary providing proper notice and comment.

Plaintiffs make identical allegations as to 1988 size regulations for plums and peaches. The plum issue is moot. As to peaches, the Judicial Officer correctly found that the 1988 regulations had little impact on minimum size requirements. *See* Wileman II, Judicial Officer's Opinion at 173-74. The interim final rule stated that two varieties of peaches would no longer be subject to size requirements. 53 Fed. Reg. 19234 (1988). It also standardized the size requirement for all varieties of peaches which are shipped in commercially insignificant quantities (*i.e.*, less than 10,000 packages). Such varieties shipped from November 1 to July 2 were now required to meet the same minimum

requirements as those shipped July 3 to October 31. *Id.* at 19234-35. While changes in the nectarine regulations were significant, the changes in size regulations for peaches made in 1988 are *de minimis*. They did not draw a single comment in response to the Secretary's notice for comments. *See* 53 Fed. Reg. at 19234.[18] Their promulgation is not considered here.

1. *Arbitrary and Capricious*

The ALJ found the 1988 size regulations to be arbitrary and capricious. The Judicial Officer disagreed. Review of the informal rulemaking record reveals sufficient evidence to support the Secretary's discretionary decision to impose minimum size requirements on nectarines.

The initial recommendation for the 1988 size regulations was made by the Nectarine Administrative Committee after a December 6, 1987 meeting. 53 Fed. Reg. 12687 at 12688 (1988). The agency sought comments which it then responded to in publishing its interim final rule on May 27, 1988. "Many of the comments" were submitted by or on behalf of plaintiffs. 53 Fed. Reg. 19226 at 19227 (1988); *see also* Wileman II, pt. 31, exhibit GG-HH containing: April 28, 1988 letter of F.T. Elliott III; April 28, 1988 letter of Brian Leighton (19 pages); April 27, 1998 letter of F.T. Elliott Jr.; April 27, 1988 letter of John R. Olive (Sales Manager of Wileman).

Review of the "supplemental information" published along with the interim final rule reveals that the agency fully considered all comments received. It summarized positive and negative comments and cited the results of

[18]Review of the comments received *after* the interim final rule was published does reveal a 59-page letter written by Brian Leighton, plaintiffs' former counsel, dated June 22, 1988, commenting on the plum, nectarine and peach regulations, which mentions size regulations for peaches in two lines. *See* Wileman II, pt. 31. The Secretary fully considered this comment in issuing the final rule regarding peaches. *See* 54 Fed. Reg. 12427 at 12428 (1989).

two studies, concluding that they bolstered a move to larger fruit. 53 Fed. Reg. at 19227.[19] After contemplating all opinions expressed and evidence submitted, the agency concluded:

> The changes are necessary to remove from the market those sizes of fruit which are not being well-received by consumers. These actions are intended to foster repeat purchase and maintain consumer satisfaction. Early season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases. Increased size requirements are needed to make nectarines more marketable and are essential for the consumer satisfaction needed to maintain current markets and to build new markets. No shortage is expected as a result of the size changes, rather, healthier market conditions for California nectarines are anticipated.

Id. at 19228.

The agency specifically considered, and rejected, two arguments plaintiffs again raise here. The first is that size limitations would decrease the volume of fruit shipped. The agency responded:

> The Department disputes the contention that the proposal would drastically reduce the volume of fruit shipped because the industry has recognized the fact that in past seasons small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit. The Department finds that this action is needed to provide fresh markets with larger sizes of fruit preferred by these markets.

Id. at 19227-28. The agency revisited the issue of volume control in publishing the final rule one year later. 54 Fed.

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[19] The Secretary utilized a report, entitled *Final Report of California Summer Fruits Retailer Research* by Ervin D. Thuerk. 53 Fed. Reg. 19226 at 19227:

> Mr. Thuerk is a marketing consultant with the Thuerk Pr-Con Company in Westlake Village, California. Mr. Thuerk directed a project designed to ascertain individual retailers' attitudes and their wants and needs for fruit quality and maturity. Meetings were held with 25 companies in approximately 20 cities, representing nearly 17,000 retail supermarkets. These supermarkets equal 38.7 percent of the total industry units operated. Information was obtained on: (1) Product needs in the fresh produce market; (2) retail marketing trends and how they are changing; (3) consumer attitudes and their changing wants and needs; (4) the development of future programs for the marketing of California fruits; and (5) attitudes toward industry standards and marketing programs.

Id. Plaintiffs do not contest the scope of the Thuerk Report. The Secretary concluded, "The finding indicate that early season fruit which is small in size does not provide satisfaction to the consumer, does not encourage repeat purchases, and not does it benefit the market." *Id.*

The summary of Thuerk's findings includes the following statement, "65 percent of the retailers are stressing larger sizes for all fruits. This is what the consumer is buying—'bigger is better, even though we know different.' ... Also, numerous references were made to the need for more consistency or uniformity of sizing in the packs." Thuerk Report, Wileman II, pt. 41, ex. 32(GG) at 3. The report also contains the following quote from a retailer: "Tell the growers we face real problems marketing small fruit. We will not use 4×5 plums or 96/108 size nectarines and peaches."

The administrative record before the Secretary also contained letters from growers in support of the size regulations. *See* Wileman II, pt. 38, ex. 31(HH). For instance, one grower stated his opinion that smaller fruit is not acceptable to consumers and that achieving larger size fruit can be achieved at minimal cost. *Id.*, April 8, 1988 letter of LeRoy Giannini ("For reasons best known to them, it has become crystal clear the modern-day consumer has become increasingly disinterested in taking those very smallest prices of fruit into their homes. That message has been made loud and clear to the Industry").

Reg. 12419 (1989). It again rejected plaintiffs' comments, noting that information from the 1988 season demonstrated that "production volume and sales increased with the higher size requirements in effect." *Id.* at 12420.

A second area of contention was the effective date of the new regulations. "[S]ome commentators contended that it is too late for growers to modify their cultural practices (i.e., pruning and thinning) in order to meet the more restrictive size requirements contained in the proposal." 53 Fed. Reg. at 19228. Others rejected that argument, arguing "such small size fruit should be removed from the market as it would be very difficult to move and would in turn adversely affect the pricing structure of the market." *Id.* at 19227. The Secretary resolved the debate by finding,

> [A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit size. Any committee recommendation reflects the sentiments of the industry and the feasibility and practicality of the contemplated action.

Id. at 19228.[20] That the agency disagreed with plaintiffs' contentions, does not, of course, make its actions arbitrary and capricious. "So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir.), *cert. denied*, 113 S.Ct. 598 (1992).

[20]Plaintiffs appear to contend that the Secretary's decision as to the effective date of the regulations was arbitrary and capricious because, in rejecting similar size regulations proposed by the plum committee, he cited growers' inability to make cultural changes at such a late date in the season. *See* 53 Fed. Reg. 19218 at 19220 (1988). Contrary to demonstrating arbitrary decisionmaking, these apparently inconsistent decisions regarding the inability to make cultural changes can reasonably be explained by the differences in the two commodities. Plaintiffs concede that grower opposition to the implementation of size regulations for plums was much greater than for nectarines.

2. *Procedural Requirements*

Plaintiffs next allege that the 1988 size regulations for nectarines are invalid because they were promulgated in contravention of the procedural requirements provided by the APA.[21] The ALJ agreed, but was reversed by the Judicial Officer. Specifically, plaintiffs allege that the agency provided only 15 days for public comment and no waiting period before the regulations became effective.

The proposed rule was published on April 18, 1988. 53 Fed. Reg. 12687 (1988). Only a 15-day comment period was provided, as the Secretary determined:

> A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if

[21]Plaintiffs contend that internal regulations of the agency provide evidence of the invalidity of the size or assessment regulations. Plaintiffs cite to "Department Regulation" DR 1512-1, issued December 15, 1983, which states in part:

> The Department is committed to providing the public reasonable opportunity to participate in rulemaking. For rules that have substantial effect, it is recommended that comment periods on proposed regulations be thirty-days or more.

DR 1512-1 contains the following disclaimer:

> [T]his directive ... is not intended to create *any* right or benefit, substantive or procedural, enforceable at law by a party against the United States [or] its agencies ...

(emphasis in original). The agency's compliance or noncompliance with DR 1512-1 is not judicially reviewable. *Cal-Almond, Inc., v. USDA*, No. CV-F-91-123-REC, Order of June 3, 1992 at 21; *State of Michigan v. Thomas*, 805 F.2d 176, 187 (6th Cir. 1986) (interpreting identical language in Executive Order 12,291).

> adopted, to permit the industry to plan accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the committee's recommendation.

53 Fed. Reg. at 12690. The interim final rule was published on May 27, 1988. 53 Fed. Reg. 19226 (1988). It became effective immediately. An additional 45-day comment period was provided. The Secretary determined:

> Pursuant to 5 U.S.C. 553, it is found and determined that it is impracticable, unnecessary, and contrary to the public interest to give notice prior to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Registrar because: (1) Shipments of 1988 crop nectarines have begun and this action should cover as much of the 1988 crop as possible. . .
> . . . An opportunity needs to be provided for interested persons to file comments, but, as mentioned earlier, it is imperative that the size and maturity requirements and variance procedures apply to as much of the 1988 crop as possible.[22]

53 Fed. Reg. at 19231-32. The final rule was published on May 27, 1989. 54 Fed. Reg. 12419 (1989).

In analyzing procedural compliance, it is important to separate out the Secretary's decision that good cause

[22] Additional reasons are provided by the Secretary but they deal with the portion of the rule affecting change in maturity standards.

existed to forgo the 30-day waiting period from his decision that good cause existed to implement the regulation prior to providing the full 30-day comment period. In ruling on volume restriction regulations promulgated weekly pursuant to the navel orange market order, the Ninth Circuit recently explored the concept of the good cause exception, as well as the Secretary's history of noncompliance with the APA. *Riverbend Farms,* 958 F.2d at 1485. It held that the good cause exception which allows an agency to forego the 30-day waiting period between publication of a final rule[23] and its effective date is independent from the good cause exception excusing an agency from abiding by the notice and comment requirements:

> Unlike the notice and comment requirements, which are designed to ensure public participation in rulemaking, the 30-day waiting period is intended to give affected parties time to adjust their behavior before the final rule takes effect. This is sensible; until the final rule is published, the public is not sure of what the rule will be or when the rule will actually be promulgated. In addition, a window of time usually causes no harm.

Id.; see also U.S. Steel Corp. v. EPA, 605 F.2d 283, 289-90 (7th Cir. 1979), *cert. denied,* 444 U.S. 1035 (1980) (good cause more easily found as to 30-day waiting period).

The court held that good cause to make weekly volume restriction regulations immediately effective was demonstrated. The affected parties had advance notice sufficient

[23] Here, the interim final rule rather than the final rule is at issue as the regulations became effective upon promulgation of the interim final rule.

to permit them to adjust their behavior and requiring a 30-day waiting period would cause great harm. 958 F.2d at 1485. Both conditions exist here. Growers and handlers knew well in advance that the Secretary intended to institute size regulations for the 1988 season. The proposed rule, published 39 days prior to the regulation becoming effective, expressly stated that intention:

> The harvest and shipment of the 1988 nectarine crop is expected to start April 25, 1988, and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan accordingly.

53 Fed. Reg. at 12690. Also, as discussed above, the Secretary found in publishing the interim final rule:

> [A]t the time the committee made its recommendation most growers had begun to undertake ordinary cultural practices on their orchards to attain desirable fruit size.

53 Fed. Reg. at 19228. Further evidence of growers' knowledge is a letter referenced in the "supplemental information" published along with the proposed rules. The writer opposed the proposed regulations, but understood as of March 1988, that the Secretary intended to apply them in the 1988 season. 53 Fed. Reg. at 12688. Review of letters written by plaintiffs in response to the proposed rules demonstrate a similar understanding.[24]

The Secretary correctly found that requiring the 30-day waiting period in this case would cause harm to the

[24] In these letters, plaintiffs protest that others are unaware of the new regulations, yet provide no support for this allegation. *See* Wileman II, pt. 31, exhibit HH.

nectarine industry. 53 Fed. Reg. at 19231-32. In issuing the interim rule, the Secretary found "[e]arly season purchases of small-sized nectarines have a negative impact on total nectarine sales because consumers do not make repeat purchases after being dissatisfied with their original purchases." *Id.* at 19228. Following the logic of the agency's factual finding, allowing the sale of small-sized fruit for another thirty days at the beginning of the season would have had a detrimental impact on the sale of nectarines throughout the season. Agencies may depart from APA procedures "where compliance would jeopardize their assigned missions." *Riverbend Farms* at 1484. Here, the Secretary had a basis to determine that compliance with the 30-day waiting period would harm the sale of a commodity he had a duty to promote.

Waiting an additional thirty days to enforce the rules also would have created inequities within the industry. The California stone fruit industry is a highly regulated industry in which growers and handlers reasonably depend on the Secretary to issue rules which will be applicable throughout a growing season. Different varieties of nectarines are harvested at different times beginning in late spring and continuing throughout the summer. If an additional thirty days had been required, those growers whose fruit matured early in the season would have had an unfair advantage (*i.e.*, the ability to sell small fruit) over those who harvest later in the season.[25]

The second procedural flaw alleged is the agency's failure to provide a 30-day comment period prior to the

[25] Plaintiffs claim, without support, that the agency created the time urgency by "sitting" on the committee's recommendations for four months. Plaintiffs complained throughout these proceedings that the Secretary failed to properly supervise the marketing committees. However, here, plaintiffs complain the Secretary took too long to review the marketing committees' size regulation recommendations.

regulation becoming effective.[26] The government advances alternate justifications to address this contention. First, it suggests that a fifteen day comment period is in itself sufficient. While the APA mandates no minimum comment period, *Riverbend Farms,* 958 F.2d at 1484, the government has not cited any case in which such a brief comment period was, by itself, found adequate.

Second, the government suggests that the various opportunities given the public to comment on the regulations—the committee meeting, the period prior to publication of the proposed rule, the 15 days provided in March, and particularly, the 45 days provided after the regulation went into effect—add up to more than satisfy the 30 days the Secretary failed to provide. No authority is cited. The Ninth Circuit rejected the idea that a post-promulgation comment period can cure the lack of pre-promulgation notice and comment in *Western Oil & Gas v. United States E.P.A.,* 633 F.2d 803, 810-811 (9th. Cir. 1980). Yet, a 1987 district court opinion, *Sullivan v. Farmers Home Admin.,* 691 F. Supp. 927, 932 (E.D.N.C. 1987), analyzed the holding in *Western Oil* at length, and provides a convincing argument as to why it should be inapplicable here:

> The post-hoc comment period at issue in the EPA cases [*i.e., Western Oil*], clearly was not an adequate substitute for prior comment and argument and, thus, did not provide meaningful participation in the decision making process. The promulgation of the final regulations by the EPA ended the decision making process. There was never any indication that the EPA would seriously consider public input made during the post-

[26] An adequate notice period was provided, as the proposed rule was published 39 days prior to it becoming effective.

> hoc comment period. The situation in the current case is completely different.
>
> The distinguishing factor between the EPA cases and this case is the continuation of the decision making process by FmHA after the promulgation of the "interim" final regulations. The fundamental issue is whether plaintiffs were afforded adequate opportunity for meaningful participation in the decision making process. Here, the answer is yes. Unlike the EPA, FmHA clearly remained receptive to information and argument submitted during the comment period. The regulations of May 22, 1986, were promulgated by the agency merely as "interim" regulations. Following the comment period, FmHA evaluated and addressed those ideas submitted in writing, and even incorporated some of these suggestions into the final regulations of August 18, 1987.

A nearly identical situation exists here. The regulations were promulgated in "interim final" form. Following the post-promulgation comment period, the Secretary evaluated and addressed plaintiffs' comments in writing. While the Secretary declined to incorporate plaintiffs' suggestions, review of the "supplemental information" published with the final rules demonstrates that he fully considered plaintiffs' views.

The reasoning advanced by the court in *Sullivan* has been independently adopted by other courts. In *Universal Health Serv. of McAllen v. Sullivan,* 770 F. Supp. 704 (D.D.C. 1991), *aff'd* 978 F.2d 745 (D.C. Cir. 1992), the court held:

> Although post-promulgation opportunity for comment is not a substitute for pre-

> promulgation notice and comment, failure to comply with the pre-promulgation procedures of § 553 of the APA may "be cured by an adequate later notice" if "the agency's mind remain[ed] open enough at the later stage."

Id. at 721, *quoting McLouth Steel Prods. Corp. v. Thomas,* 838 F.2d 1317, 1323 (D.C. Cir. 1988). The court found that the Department of Health and Human Services's failure to engage in pre-promulgation notice and comment was at least partially cured by it having adequately considered post-promulgation comments prior to publishing final rules. *Id.* In 1992, a court cited to *Universal Health Serv. of McAllen* in holding a post-promulgation comment period completely cured a failure by the Department of Transportation to provide notice and comment. *Five Flags Pipe Line Co. v. U.S. Dept. of Trans.,* No. 89-0119, 1992 WL 78773 at *5 (D.D.C. April 1, 1992).

Third, the government suggests that the regulations can be upheld under the good cause exception.[27] Under the good cause exception, notice and comment is not required when doing so would be: (1) impracticable; (2) unnecessary; or (3) contrary to the public interest. 5 U.S.C. § 553. For the reasons stated above, good cause here existed for the Secretary to implement the regulations with an abbreviated comment period. The good cause exception "authorizes departures from the APA's requirements only when compliance would interfere with the agency's ability to carry out its mission. The agency thus must minimize conflict with those APA requirements it is capable of

[27]The Secretary did not expressly invoke a good cause exception in implementing the regulations without providing a 30-day comment period. He did so only as to his decision to forgo the 30-day waiting period. Yet, he implicitly did so by providing his rationale in comments published along with the proposed and interim final rules, as outlined above.

complying with." *Riverbend Farms,* 958 F.2d at 1485. The agency has done so here by providing a partial comment period prior to making the regulations effective and an additional comment period for 45 days after that date.

Moreover, the agency committed procedural error in failing to provide a full 30-day comment period, such error was harmless. 5 U.S.C. § 706. *Riverbend Farms* warns that "we must exercise great caution in applying the harmless error rule in the administrative rulemaking context," but holds the failure to provide notice and comment to be harmless "where the agency's mistake 'clearly had no bearing on the procedure used or the substance of decision reached.'" 958 F.2d at 1487 (citations omitted). As documented above, the proposed changes were fully discussed in the committee's public meeting held in December, 1987. The agency received comments prior to publishing the proposed rule, and later responded to them. Most importantly, plaintiffs submitted detailed comments opposing the size regulations. The Secretary fully considered and responded to these comments in publishing the interim final and final rules. Fifteen additional days of pre-promulgation comment time would not have affected the promulgation of these regulations.

E. *Assessments*

Plaintiffs assert a variety of challenges to the Secretary's imposition of assessments on handlers which fund promotional and research efforts, as well as the costs of inspection services and the administration of the three fruit committees. The amount of the assessments is set on a yearly basis and is tied to the volume of fruit each handler ships. The impetus of plaintiffs' claims attacking the assessments is their objection to the committees' generic advertising campaigns. The major focus of the committees' promotional efforts has been to market California tree fruit

to consumers nationally. The advertising emphasizes the qualities of each type of fruit and the superiority of California-grown fruit. No advertising by specific brand is allowed. Plaintiffs claim their money can be better spent elsewhere.

1. *Reasoned Decisionmaking As to Generic Advertising*

Plaintiffs first allege that the annual assessments from 1980 until the present were unlawfully imposed because the Secretary has failed in his duty under the APA to engage in reasoned decisionmaking as to the need for generic advertising. Plaintiffs argue, in effect, that the annual regulations imposing assessments are arbitrary and capricious because the Secretary has never justified the need for generic advertising on the record. Plaintiffs allege that the Secretary merely instituted the program by publishing the assessment rate and has each year simply adjusted the amount owed. The ALJ agreed with plaintiffs. The Judicial Officer disagreed.

Review of the record demonstrates plaintiffs' claims to be unsubstantiated. In 1954, Congress amended the AMAA to authorize the Secretary to promulgate regulations:

> [e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

Pub. L. No. 83-690, § 401, codified at 7 U.S.C. § 608c(6)(I). The authority to implement paid advertising programs was extended to plums and nectarines in 1965, Pub. L. No. 89-330, and to California-grown peaches in 1971, Pub. L. No. 92-120.

The Secretary then conducted formal rulemaking hearings on the record, pursuant to 5 U.S.C. §§ 556 and 557 of the APA. As to plums and peaches, formal rulemaking took place in 1965 to allow for "development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit," 7 C.F.R. § 917.39 (1965). The marketing order was amended to include authority for "paid advertising" for plums, after an additional formal rulemaking was conducted in 1971. Formal rulemaking conducted in 1976 resulted in amendment of § 917.39 to include authority for paid advertising for peaches. The current version of § 917.39 reads:

> The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

As to nectarines, formal rulemaking hearings were held in 1958 to allow funding for research and promotion, and again in 1966 to allow paid advertising. The applicable section of marketing order 916 is identical to § 917.39. 7 C.F.R. § 916.45.

Plaintiffs do not challenge the adequacy of the formal hearings, nor the findings made by the Secretary in amending the marketing orders.[28] Indeed, the Secretary's

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[28] In their post-hearing brief filed at the agency level, plaintiffs for the first time alleged that the formal rulemaking was defective because only a 10-day

findings as to the benefits of advertising are extensive. For example, in publishing his recommended decision as to plums, 36 Fed. Reg. 8735 (1971), the Secretary found:

> The records show the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention, plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign.

36 Fed. Reg. at 8736. The Secretary also reviewed in detail marketing considerations pertinent to paid advertising:

> The third technique is paid advertising, often referred to as "media". Media is expensive but some things can be done in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for a seasonal fruit

comment period was given. *See* Wileman II, Judicial Officer's Opinion at 38. At oral argument before this Court, plaintiffs raised for the first time objections as to the adequacy of the substantive formal rulemaking record in 1965. Neither issue is considered here as judicial review is limited to matters raised by plaintiffs in their § 608c(15)(A) petition and ruled on by the Secretary.

> such as the plum. Spot radio or TV commercials in the principal markets during peak movement periods is a possibility. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be merchandised in such a way as to secure extra display space, and promotional price and tie-in advertising financed by the retailer.
>
> Since most of the food page publicity occurs in newspapers, some newspaper advertising might be indicated partly because newspapers are understandably influenced in favor of advertisers when scheduling editorial space. Such ads at the beginning of the season could take the form of announcing the seasonal availability of the fruit while later ads could elaborate upon the deliciousness of the fruit and pinpoint periods of greatest availability.
>
> The Plum Commodity Committee should have the responsibility of developing and carrying out each season's advertising and promotional program.

36 Fed. Reg. at 8737. *See also* 41 Fed. Reg. 14375 at 14376-77; 31 Fed. Reg. at 5635 at 5636 (1966). It cannot be said in light of this history that the Secretary did not evaluate the benefits of generic advertising.

Plaintiffs contend that this formal rulemaking is somehow irrelevant. Since the regulations state that "[t]he committees, with the approval of the Secretary, *may* establish . . . development projects . . . including paid advertising," plaintiffs contend that formal rulemaking only gave the Secretary the "theoretical discretion" to approve paid advertising and that it is necessary for the Secretary to conduct informal rulemaking as to the viability of paid advertising prior to actually allowing the committees to conduct advertising campaigns. "The Secretary must evaluate and provide reasons for the implementation of *any* advertising program, which the Secretary has *never* provided." Plaintiffs' Summary Judgment Brief at 231 (emphasis in original).

Plaintiffs cite no legal authority for this suggestion that the Secretary must expand his rule-making efforts. Nor have plaintiffs demonstrated changed conditions underlying the agency's findings such as might require the rules to be reconsidered. Upon formal rulemaking, the Secretary determined that paid advertising should be authorized as an appropriate expense that served industry interests. He allowed the committees to institute such programs subject to his approval. He has given such approval by ratifying the committees' annual budgets. No legal or logical reason exists to require that the Secretary annually re-institute informal rule-making to enable industry advertising.

The Secretary fully considered the benefits of advertising in amending the marketing orders through formal rulemaking, the adequacy of which plaintiffs have not challenged. Plaintiffs' contentions concerning advertising are rejected.

2. *Procedural Requirements*

Plaintiffs next challenge the annual assessment regulations on procedural grounds. They allege that the rates were published in violation of the APA because each year

the Secretary failed to provide an adequate notice and comment period as well as an adequate statement of basis and purpose. From 1980 through 1987 the assessment rates were published only in the form of a final rule. No notice and comment period was provided. In 1988 and 1989 expenses and assessment rates were published first as a proposal and a 10-day comment period was provided. In all years, the Secretary relied on a good cause exception to provide less than thirty (30) days for notice and comment. Rates were typically published in the summer months and were effective retroactively to the start of the harvest season on March 1 of each year.

As to the lack of a notice and comment period, the Judicial Officer found, and the ALJ agreed,[29] that good cause existed for the Secretary not to have engaged in notice and comment procedures because establishing the assessment rate is only a mechanical task. The Judicial Officer further found the APA is inapplicable to the Secretary's actions in setting annual budgets for the committees.

> At the time of the publication of the final rule setting forth the assessment rate, all discretionary budget determinations have previously been made, and the budgetary-approval process is not subject to the Administrative Procedure Act. Since the final rule announcing the assessment rate sets forth a statutorily-required ministerial calculation, good cause exists for dispensing with notice-and-comment rulemaking. As shown above, however, the Secretary has access to a large amount of data and

[29] While not entirely clear, the ALJ appears to have later reversed her position in this regard in Wileman II. *Compare* Wileman I, decision of ALJ at 338-44 *with* Wileman II, decision of ALJ at 195-96.

> recommendations with respect to all items of the budget, including the minutes of the public meetings at which the budget is discussed.

Wileman II, Judicial Officer's Opinion at 86.

An agency's determination as to the applicability of the APA, as well as the appropriateness of a good cause exception for non-compliance with the APA, are questions of law to be reviewed *de novo* by the district court. *See Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 757 n.4 (9th Cir. 1992). *De novo* review of the record supports the finding that good cause existed to dispense with full notice and comment requirements. The annual assessment rate is determined by the statutorily required calculation set forth in 7 U.S.C. § 610(b)(2)(ii). The Secretary only performs the mechanical function of dividing anticipated expenses by the expected shipments of the commodity. Both sets of projected numbers are formulated by the committees after holding public meetings. *See e.g.*, Wileman I, pt. 38, ex 22 (minutes of subcommittee for promotion and research); pt. 23. ex. 2, N-1-A (minutes of nectarine committee).[30]

The Secretary is not required to provide notice and comment as to the projected yearly budget of the committees. He has already conducted formal rulemaking which authorized him to approve the committees expending money for specific activities sanctioned by Congress, such as research and advertising. While plaintiffs are correct in asserting that the committees' budgets have a substantive impact upon them, the Secretary's authority to impose assessments for appropriate expenses was

[30]The projected budgets and crop shipments are also described in detail in the Marketing Policy sent to the Secretary. *See e.g.*, Wileman I, pt. 29, ex. 8, AMS-[2]-H. Field Office memorandum sent to the Secretary also discuss these projections. *See e.g.*, Wileman I, pt. 29, ex. 8, AMS-1.

established long ago.[31] If expenses are within authorized categories, the Secretary has the same discretionary right to set the committees' budgets as he does for any other entity under his control. Plaintiffs provide no authority for the proposition that the APA requires the Secretary's funding decisions on authorized programs to be open to public debate. The AMAA and the marketing orders provide plaintiffs access to annual budgetary decisions at the committee level by providing for public meetings.

A finding that good cause existed to shorten or eliminate the notice and comment period is more easily justified,[32] when the assessment rate is viewed as the product of two calculations which the public has no right to comment upon at that stage of the promulgation.[33] Where the Secretary has no discretion in applying the rate formulation, in deciding who will be assessed, or in determining the period in which the rate will apply, there is no unresolved issue upon which meaningful comment can be submitted. *See also Cal-Almond, Inc. v. U.S.D.A.*, No. CV-F-91-064 REC, order of June 3, 1992, at 10 (reaching same conclusion as to annual almond assessments).

Good cause here is supported by the need for the Secretary to communicate the assessment rate to the

[31]As the Judicial Officer explained in quoting the ALJ in part:

> It is true that the budgets of these Committees [and other USDA agencies whose budgets are approved by the Secretary without notice and comment rulemaking] affect payment from others, whether they be general taxpayers, fruit handlers, or recipients of some other fee-based Government service. But in all cases this ultimately is a case of Secretarial discretion in approving the expenses of the Committees which *in themselves* impose no direct financial requirement on others.

Wileman I, opinion of Judicial Officer at 82 (emphasis in original).

[32]The government has not suggested that the promulgation of the assessment rate itself is exempt from APA requirements.

[33]Plaintiffs have not suggested that the APA is applicable as to the Secretary's estimate of the volume of fruit likely to be shipped in the year.

industry in as expedient a manner as possible. The system is such that the growers do not definitively know what the assessment rate will be until midway through the harvesting season. Plaintiffs contend that the Secretary creates this urgency by allowing the committees to delay holding their public meetings until May of each year. In fact, since the Secretary is required to compute the assessment rate based on projected crop production and committee budgets, it is reasonable that the public meetings be set far enough into the season to enable intelligent estimates of both numbers to be made. The marketing orders anticipate that the committees will submit their recommendations only after the season begins. *See, e.g.,* 7 C.F.R. § 916.31(c). The marketing orders similarly anticipate that the Secretary will not set the rate prior to the season beginning. *See e.g.,* 7 C.F.R. § 916.41(b). Given such constraints, it is incumbent upon the Secretary to issue the rates in a timely manner. It is not unreasonable to determine that prompt imposition of the actual rate was more important than advance notification of a proposed rate, where, at that point in the process, neither the Secretary nor the public had a ability to affect the outcome.[34]

Additionally, even if the Secretary failed to provide proper notice and comment without adequate good cause existing to warrant an exception, the failure is harmless error, pursuant to the test described by the Ninth Circuit in *Riverbend Farms.*

Plaintiffs also contend that the final rules issued by the Secretary specifying the assessment rates are deficient in that no "basis and purpose statement" was provided as

[34]This is not to condone a return to the former practice of totally eliminating the notice and comment period in issuing assessment rates. Even where, as here, the practical impact of providing the opportunity for notice and comment is slight, the larger policy goals behind the APA remain important. An agency must minimize conflict with the APA by complying to the extent to which it is capable. *Riverbend,* 958 F.2d at 1485.

required by 5 U.S.C. § 553(c). Plaintiffs note that from 1980 through 1987, the final rule amounted to a single paragraph stating that expenses of a certain amount were authorized and a certain assessment rate established. This identical issue was fully considered by District Judge Robert E. Coyle in ruling on a § 608c(15)(B) petition concerning almond assessments. *Cal-Almond, Inc. v. U.S.D.A.*, No. CF-F-91-064 REC, order of June 3, 1992, p. 12-16. Judge Coyle's reasoning is persuasive.

The purpose of Section 553(c) is to "facilitate judicial review." *Alabama Ass'n of Ins. Agents v. Bd. of Governors of Fed. Res. Sys.,* 533 F.2d 224, 236-37 (5th Cir. 1976), *modified on other grounds,* 558 F.2d 729 (5th Cir. 1977), *cert, denied,* 435 U.S. 904 (1978). Such a statement enables courts to be aware of the legal and factual framework underlying the agency's action. The nature and content of the action undertaken determines the degree of explanation required. *Id.* Here the Secretary, as required by statute, is performing the mechanical function of dividing anticipated expenses by the expected shipments of the commodity. As outlined above, the basis for these projected calculations is fully explained in committee minutes, marketing policies, and field office memoranda sent to the Secretary. While the format adopted by the Secretary since 1988, in providing detailed "supplemental information," is preferable, eight years of assessments will not be invalidated for failure to include an explanation which is readily discernable by other means.

3. *Retroactivity of Assessments*

Plaintiffs cite *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204 (1988), for the proposition that the assessment rates are invalid because they were retroactively applied. The ALJ agreed with this contention, but was reversed by the Judicial Officer. The Secretary's final rule establishing assessment rates was published each year in the middle of

the harvesting season, often in June or July, sometimes as late as October. Yet, in publishing the rates, the Secretary stated that they were effective as of March 1, the start of the harvest season.

In *Bowen,* the Supreme Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208. While, as the government contends, there is arguably an *implicit* grant of such power in the AMAA, no express authorization exists in the Act. *But see Cal-Almond, Inc. v. U.S.D.A.,* No. CV-F-91-064 REC, order of June 3, 1992, at 11 (total assessment amounts are necessarily determined by crop year-end).

The holding in *Bowen* is inapplicable here, but for a different reason than advanced by the government. The government relies on Justice Scalia's concurrence in *Bowen* which differentiates between a truly retroactive rule and a rule having only a "secondary" retroactive effect. *Bowen,* 488 U.S. at 219. The latter type is said to be permissible based on the example of a Treasury tax regulation that imposes tax liability on future income in a manner that makes past investments less valuable. While such a regulation can "unquestionably *affect* past transactions . . . it does not for that reason cease to be a rule under the APA." *Id.* (emphasis in original). Justice Scalia concluded, "[t]hat is not retroactivity in the sense at issue here, *i.e.,* in the sense of altering the *past* legal consequences of past actions." *Id.* (emphasis in original).

The Ninth Circuit has recently adopted this reasoning in two cases, *National Medical Enterprises, Inc. v. Sullivan,* 957 F.2d 664 (9th Cir. 1992), and *American Mining Congress v. United States E.P.A.,* 965 F.2d 759 (9th Cir. 1992). In the former case, a Medicare regulation imposing a cap on reimbursements was only secondarily retroactive

because even though it phased out existing rules, it "merely provided that *at some future date*" reimbursement would cease. 957 F.2d at 671 (emphasis in original). In *American Mining Congress,* the court upheld an EPA regulation requiring owners of inactive mines to apply for a permit regulating future storm water discharges, as not altering past legal consequences of past actions. 965 F.2d at 769. Plaintiff there "ignore[d] the distinction between merely 'affecting rights' and 'retroactively imparting an obligation *cum* liability.' *Id. quoting Ralis v. RFE/RL, Inc.,* 770 F.2d 1121, 1127 (D.C. Cir. 1985).

The government argues that assessment regulations are only secondarily retroactive because the regulations have exclusively future effects, as the obligation to pay does not become binding until the rule is published. Yet, Justice Scalia expressly rejected the notion that "a rule has future effect merely because it is made effective in the future." *Bowen,* 488 U.S. at 218. In Justice Scalia's hypothetical, and the two Ninth Circuit cases, the regulation only had a detrimental retroactive effect on past actions as a *consequence of the occurrence of some future action* (*i.e.,* the investment produced income, the amount of Medicare reimbursements reached a specified level, installation of treatment systems became necessary to meet permit requirements).

Here, disregarding, as is required, that act of publishing the rules, there is no future effect *as to the assessments owed for fruit handled prior to publication of the final rule.* The effect is entirely retroactive. If plaintiffs were to stop doing business a month prior to the rates being published, under the regulations they would remain liable for assessments for fruit handled from March 1 until the last day of business. As such, these regulations do not fit under the "secondary effect" exception defined by Justice Scalia or adopted by the Ninth Circuit.

Justice Scalia's concurrence contains a much stronger basis for determining that *Bowen* is inapplicable to these

facts. The type of rulemaking at issue in *Bowen* was that which "alter[s] the *past* legal consequences of past actions." 488 U.S. at 219 (emphasis in original). *See also American Mining Congress*, 965 F.2d at 769. Here, the final rule establishing an assessment rate does not alter past legal consequences of past actions. Section 610(b)(2)(ii) of the AMAA states:

> Each order relating to any other commodity or product[35] issued by the Secretary under this title *shall provide* that each handler subject thereto *shall pay* to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find reasonable and are likely to be incurred by such authority or agency, during any period specified by him . . . (emphasis supplied).

Congress has decreed that the handlers must pay all expenses reasonably incurred by the fruit committees. This obligation exists whether publication of the assessment rate occurs in February or October of each year and without regard to when the expenses are incurred.

No additional duties are imposed on the handlers. If the Secretary published an assessment rate in February and found in November that a shortfall existed, he could sue the handlers to make up the difference. Section 610(b)(2)(iii) allows the committees to directly sue any handler refusing to pay its fair share. Publication of the assessment rates imply quantifies the amount of the obligation already imposed by Congress. This is not a situation, as in *Bowen*, where an agency changes the rules in the middle of the game.

[35] *I.e.*, other than milk.

4. First Amendment Claims

Plaintiffs next claim that the forced imposition of assessments for the purpose of generic advertising violates their first amendment rights.[36] They advance two theories. The first is their right to be free of forced associated. They allege they are being forced to participate in a generic advertising program which is contrary to their personal, professional, ideologic, philosophic and commercial beliefs.

Secondly, plaintiffs allege they are denied the right not to engage in speech. They contend the program is misguided in its methods and unsuccessful in its results.[37] To the extent the program increases sales of tree fruit, they allege it is inefficient in that it encourages "free-riding;" *i.e.*, increased sales by non-assessed competitors outside California. Plaintiffs concede that they do wish to advertise, but prefer to advertise their own brands, highlighting the individual attributes of their fruit, such as the lack of pesticides used. The financial drain of assessments is said to substantially curtail their advertising ability.

Plaintiffs and the government focus their respective arguments around a 1989 Third Circuit case, *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990). Both sides agree that *Frame* is the only published case in which a court has considered this issue.

[36] As the ALJ found for plaintiffs on non-constitutional grounds, she did not reach their first amendment, fifth amendment and unlawful delegation claims. The Judicial Officer rejected all three.

[37] Plaintiffs also contend that the program is not truly generic because assessments are used to advertise varieties of fruit grown exclusively by one grower. As their sole evidence of this claim, plaintiffs allege that in 1989 a promotional chart was distributed nationally which "included the promotion of the 'Red Jim' nectarine, and exclusive propriety variety of one of the commodity committeemen." Plaintiffs' Brief for Summary Judgment at 268. Review of the poster reveals that the variety in question is included in a chart of 25 varieties of California summer tree fruits. Wileman II, pt. 51, ex. 256. This a *de minimis* violation, if any, and is not considered further.

Frame analyzed the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901-11, which requires cattle producers and importers to pay a one dollar assessment on each head of cattle sold. The assessments finance a national beef promotional campaign. The Secretary appoints members to the Cattlemen's Beef Promotion and Research Board which administers the Beef Promotion and Research Order. The Board elects an Operating Committee which is given the responsibility of developing an advertising program and budget, subject to the approval of the Secretary. An affected producer argued the program violated his first amendment rights of free association and free speech, his fifth amendment equal protection rights, and constituted an unlawful delegation of legislative authority. All these claims were rejected.

Plaintiffs candidly admit that no court has ever found a violation of the right to be free of compelled *commercial* speech.[38] They cite to *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977), and its progeny, which establish the right to be free of compelled political speech and ask the Court to extrapolate a similar protection for purely commercial speech.[39] It is unnecessary to reach the question of whether such a right exists, as violations of commercial speech rights are analyzed under a lower

[38]The plaintiff in *Frame* conceded that, as to his compelled speech argument, the speech at issue qualified as commercial speech. 885 F.2d at 1133. Here, plaintiffs' argument seems to stray from a straight-forward concession that the speech at issue here is purely commercial to an implication that it is something more. Commercial speech is expression related solely to the economic interest of the speaker and his audience. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel*, 425 U.S. 748 (1976). The only goal of the speech at issue here is to convince consumers to buy growers' fruit. It is purely commercial speech.

[39]There is no reason to accept plaintiffs' further invitation to impose a stricter test than that established by the Supreme Court for ordinary commercial speech cases.

standard of scrutiny than forced association claims.[40] *See Frame* at 1133. Given the similarity of the claims in this factual setting, the lesser standard is subsumed into the greater.[41] *See Frame* at 1134. As discussed below, no violation is found to exist even under the higher standard.

The court in *Frame* found support for the cattle producer's right to be free of compelled association in *Abood*, which held state laws forcing employees to pay a service charge equal to the amount of union dues to be unconstitutional. *Frame* also found *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), requires a "compelling interest" standard of scrutiny be employed in forced association cases. *Frame* expressed its inquiry as follows:

> [W]e will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms.

885 F.2d at 1134.

The court examined three areas of inquiry: the government's interest, the degree of ideological neutrality, and the degree of infringement on First Amendment rights.

[40]The test for evaluating the constitutionality of commercial speech regulation was outlined in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980): (1) Does the state assert a substantial government interest? (2) Is the regulation in proportion to that interest? and (3) Is the incursion on commercial speech carefully designed to achieve the government's goal?

[41]Plaintiffs phrase the two arguments in alternate form, asking the Court to consider the compelled commercial speech claim if the forced association claim is rejected. There is no need to do so. The *Frame* test is inclusive enough to evaluate both claims, given their factual similarity.

Based on a review of the legislative history, the government's interest was held to be compelling due to the congressional finding that the economic health of the beef industry was at risk, as was the traditional way of life of the American cattleman. *Id.* at 1134-35. The purpose behind the act, the promotion of beef sales, was held to be ideologically neutral. *Id.* at 1135.

The court found the interference imposed upon the cattlemen's rights to be slight, when compared to infringements held objectionable in other cases. The Board was authorized "only to develop a campaign to promote the product that the defendant himself has chosen to market." *Id.* at 1136. Unlike cases such as *Abood,* the Board "will not engage in activities that necessarily implicate a broad range of ideological, moral, religious, economic, and political interests, such as negotiation of wage increases, medical benefits, and limitations on the right to strike." *Id.* Citing *Ellis v. Brotherhood of Ry. Clerks,* 466 U.S. 435 (1984), which holds that spending for non-political purposes burdens first amendment rights less significantly than does spending for other purposes, the court found it significant that the act expressly prohibits spending for political purposes. 885 F.2d at 1136.

The court rejected the cattle producer's specific objections to promotional activities. He had claimed that the Board "promotes a specific point of view, *i.e.,* that the consumption of beef is desirable, healthy, nutritious," and disagreed with the board's "message and methods." *Id.* at 1137. The court rejected these complaints as "vague." *Id.* The producer "failed to characterize his objections to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than strategy." *Id.* While the "government's burden is a heavy one," the court concluded the "importance of the governmental interest justifies the slight incursion on Frame's associational and free speech rights." *Id.* at 1134.

Review of the legislative history of the amendment to the AMAA which allows the Secretary to impose assessments for the purposes of promoting "the marketing, distribution and consumption" of commodities subject to marketing orders demonstrates a compelling government interest.[42] The legislative history paints a bleak description of the condition of the American farmer. H.R. Rep. No. 1927, 83d Cong., 2d Sess. (1954), *reprinted in* 1954 U.S.C.C.A.N. 3399. Production was too high and consumption too low. "Net farm income has declined 13 percent in the past 2 years while other sectors of our economy have achieved new records." *Id.* at 3402. "This very abundance has brought great economic problems to our farm people. Their income has dropped and their costs have increased." *Id.* at 3401. Instability in agriculture was found to have adverse effects on the nation's economy and security. *Id.* at 3402. The House Agriculture Committee concluded that the act "presents a farm program to protect the income of farmers while comprehending the interests, the needs, and the security of all segments of the economy and of all our people." *Id.* at 3403. The act achieved these goals through a variety of means, including encouraging "the expansion of markets and consumption at home and abroad." *Id.* at 3403. The act was also found to have the societal objective of "maintain[ing] a maximum of freedom of enterprise in farming, keeping it a business in which free and self-respecting men and women can earn a decent living for themselves and their families." *Id.* at 3407.

The purpose underlying the generic advertising programs is ideologically neutral. Its only goal is to bolster the

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[42] The amendment was part of legislation entitled the Agricultural Act of 1954, Pub. L. No. 83-690, which was intended to stabilize the agricultural industry through a variety of means, chief among which was a system of price supports.

The brief legislative histories of the amendments to the AMAA which include specific authorization for the use of paid advertising for the three fruits contain no discussion as to the need for assessments. *See* 1965 U.S.C.C.A.N. 4142; 1971 U.S.C.C.A.N. 1406.

image of California tree fruit in an effort to increase sales. "It harbors no intent to 'prescribe orthodoxy' or 'communicate an official view.'" *Frame*, 885 F.2d at 1135 (*citing Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943)).

The assessment programs' interference with first amendment rights is slight. The marketing committees are "authorized only to develop a campaign to promote the product[s] that [plaintiffs] have chosen to market." *See Frame* 885 F.2d at 1136. Plaintiffs concede they are presently advertising on their own. Their is no allegation that the marketing committees have taken actions to censor or limit plaintiffs' advertising activities.

The committees are allowed to engage only in commercial speech on behalf of fruit growers and handlers. As a consequence, the committees' activities will not implicate the range of interests which potentially result in broad constitutional incursions. The government concedes that if the committees were allowed to expend money for lobbying purposes or to fund political campaigns, the infringement would be intolerably great. This is not the case, as the marketing committees are not authorized to spend assessment funds for political activities.[43]

As to plaintiffs' specific objections to the promotional activities authorized by the marketing committees, most appear to be complaints as to the marketing strategy employed. "[T]he individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood*, 431 U.S. at 223. Plaintiffs' complaints of this type are both great and small. At the broadest level, they complain that the advertising program simply does not work. To the extent that it does increase sales of fruit

[43] Plaintiffs' claims against individual committee members alleging they expropriated assessments for non-authorized purposes, including lobbying, will be addressed and resolved in that lawsuit.

generally, they allege it does not result in sales of California-grown fruit, as there is a lack of information in the stores which would allow consumers to differentiate California fruit from fruit grown in other regions. To the extent the program results in greater sales of California fruit, it does not benefit the varieties plaintiffs sell, because the campaign emphasizes the red color of California fruit, while they specialize in yellow varieties. Plaintiffs further allege: the promotion would be more effective for their needs if the campaigns were targeted at wholesale buyers and included in-store taste tests; radio ads often are scheduled at odd times of day, such as early morning, and the quality of the ads are poor. In short, plaintiffs allege they could do a much better job marketing their fruit. These are simply disagreements over strategy.

Plaintiffs' other bases for objecting to the promotional campaigns are not entirely clear. They provide the total dollar amounts of assessments imposed on their fruit as evidence of the economic burden, yet the issue is not the degree to which the assessment programs impose a financial hardship, but the degree to which they impose on first amendment rights. Plaintiffs cannot overcome the reality that the assessments are being used to promote a product which they produce.

Scattered throughout plaintiffs' briefs are additional objections which are difficult to characterize or quantify. They assert that the advertising condones "lying" in that it promotes the "lie" that red colored fruit is superior, that it rewards mediocrity by advertising all varieties of California fruit to be of equal quality, that it promotes sexually subliminal messages as evidenced by an ad depicting a young girl in a wet bathing suit, and that it promotes the "socialistic programs" of the Secretary. It is impossible from these "vague claims" to determine that plaintiffs' first amendment rights have been significantly infringed.

While the AMAA implicates the first amendment rights of handlers forced to participate, it was enacted in

furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimal degree no more than necessary to achieve the stated goal.

5. *Equal Protection Claim*

The Fifth Amendment contains an implicit right of equal protection barring the federal government from discriminating between individuals or groups. *Washington v. Davies,* 426 U.S. 229, 239 (1976). Plaintiffs allege that they are being discriminated against because advertising assessments are imposed on handlers of California fruit, but not upon those who handle out-of-state or foreign fruit. Plaintiffs acknowledged the weakness of this argument at the oral hearing by conceding that they consider their other arguments to be "substantially stronger." *Frame* rejected a similar claim. 885 F.2d at 1137-38.

The Supreme Court has held:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.'"

Schweiker v. Wilson, 450 U.S. 221, 234 (1981) *quoting Dandridge v. Williams,* 397 U.S. 471 (1970) (citations omitted, bracketing in original). "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is

particularly a legislative task and an unavoidable one. Perfection in making the necessary classification is neither possible nor necessary."[44] *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 314 (1976).

Here, a rational relationship exists. Review of 7 U.S.C. § 608c(11) demonstrates that Congress believed the policies of the AMAA were best accomplished by regionalization. Congress was cognizant of the fact that different geographic areas and different commodities have different marketing needs. Marketing orders "shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out" the declared policy of the act. 7 U.S.C. § 608c(11)(B). Congress declared the policy of the AMAA to be to "establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish" parity prices for farmers and protection for the interests of consumers. 7 U.S.C. § 602(1)(2). In its policy statement, Congress expressly empowered the Secretary to employ market development programs as one method of achieving the orderly marketing of specified commodities, including plums, nectarines and California peaches. 7 U.S.C. § 602(3), referencing § 608c(6)(I). It is not necessary to evaluate whether imposing assessments upon the fruit of one region and not others is wise. It is enough that Congress had a reasonable basis for determining that such a policy was necessary. The stated need for market stability is a sufficient basis.

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[44] Plaintiffs suggest that a "compelling interest" standard of scrutiny is appropriate here as fundamental first amendment rights are at issue. Given the minimal impact of these rights, as outlined above, this heightened standard need not be applied.

6. *Unlawful Delegation of Legislative Authority Claim*

The last of plaintiffs' constitutional challenges is an allegation that the AMAA is unconstitutional because it unlawfully delegates legislative authority to the Secretary to impose assessments on behalf of the marketing committees. Plaintiffs are fifty years too late in pressing an unlawful delegation claim. *See Wileman Bros. & Elliott, Inc. v. Giannini*, 909 F.2d 332, 337 n.9 (9th Cir. 1990) (noting the "virtual absence of cases striking down a delegation"). "With respect to federal agencies, only very broad, literally standardless grants of legislative power will offend the Constitution." *Id; see also Skinner v. Mid-America Pipeline*, 490 U.S. 212, 218 (1989) ("so long as Congress provides an administrative agency with standards guiding its actions such that a court could 'ascertain whether the will of Congress had been obeyed,'" no unlawful delegation of legislative power has occurred).

As described above, the statute's "Declaration of Policy," 7 U.S.C. § 602, delineates the goals of the AMAA, as well as the methods the Secretary may employ in achieving those goals. Far from a "literally standardless grant of legislative power," the Act allows the Secretary to impose assessments for a limited range of activities after rulemaking has been completed. That plaintiffs disagree with many of these activities does not make them unlawfully delegated.

The argument that the unlawful delegation has been made not to the Secretary, but to the marketing committees themselves, is equally unavailing. As the court found in *Frame*, delegation of the responsibility for the implementation of an advertising campaign is not an unlawful delegation. 885 F.2d at 1128. No lawmaking authority has been entrusted to the committees. All budgets, plans and projects formulated by the committees become final only upon the approval of the Secretary.

F. *Compliance with the Sunshine Act, California's Brown Act, and the Federal Advisory Committee Act.*

Plaintiffs allege that the three fruit committees have failed to comply with the Sunshine Act, California's Brown Act, and the Federal Advisory Committee Act. Plaintiffs then admit that the Sunshine Act is inapplicable and never again discuss the impact of the Brown Act, except to drop a footnote stating that the committees fall within its purview because they are "local agencies," which plaintiffs define as including "any non-profit corporations created by one or more local agencies." No authority is provided for the proposition that the United States Department of Agriculture is a "local agency," or explanation as to how the Brown Act is applicable in the context of this case.

As to the Federal Advisory Committee Act, 5 U.S.C. App., plaintiffs concede in their reply brief that "the annual spring and fall meetings of the committees were properly noticed and held openly." They cite no evidence that the committees attempted to discourage public attendance or participation at the meetings, or that plaintiffs have been unable to express their views. Instead, plaintiffs allege that committee members created an "alter-ego corporation," known as the Tree Fruit Reserve, the purpose of which is to allow certain committee members to predetermine the outcome of committee meetings and arrange for the theft of the annual assessments.

To the extent the Federal Advisory Committee Act is applicable to the fruit committees,[45] plaintiffs have failed to explain how the actions of the committees themselves contravene its requirements. Resolution of allegations as to the acts of individual committee members or the Tree Fruit

[45]The Judicial Officer found the statute to be inapplicable to the committees, as their role is primarily operational rather than advisory. It is not necessary to resolve this issue.

Reserve is left to plaintiffs' suit against them. To the extent plaintiffs allege that this conspiracy involved the Secretary and USDA employees, their alleged illegal conduct is not at issue in this review of administrative rulemaking.

G. *Legality of the California Tree Fruit Agreement*

Plaintiffs allege that the California Tree Fruit Agreement ("CTFA") is a non-entity which has never been granted authority by the Secretary pursuant to the APA. This appears to be an uncontested statement. The CTFA is mentioned only in Marketing Order 917, where there is a minor reference to sending reports and requests to the "Control Committee, California Tree Fruit Agreement." 7 C.F.R. § 917.110. The basic problem with developing plaintiffs' argument further is that there appears to be no agreement as to what the term "California Tree Fruit Agreement" means. The Judicial Officer offers a description which reflects the fluidity of the definition of CTFA depending on the circumstances:

> The term "California Tree Fruit Agreement" (CTFA) is a term that has different meanings, depending on the context in which it is used. The term is variously used by different people, or even the same people at different times, to refer to any or all of the various groups of people associated with Marketing Orders 916 and 917, or to Marketing Order 917 itself. To growers, handlers, and others associated with the industry, "CTFA requirements" may mean, at times, explicit USDA regulations under Order 916 or Order 917, or specific maturity tests either as determined by the Inspection

> Service or as determined by changes and variances made by the administrative committees. Inspection Service personnel use the term to refer to any Committee members or staff personnel or to requirements under the two Marketing Orders, as distinct from Inspection Service personnel and the requirements in the U.S. Standards. The Committees' members and the hired staff personnel tend to use the term "CTFA" to mean the hired staff employees, and use "CTFA requirements" to mean any Marketing Order requirements, although such usage is not consistent.
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> * * * * *
>
> In a 1977 memorandum of agreement between the Control Committee of CTFA (i.e., the Control Committee of Order 917), the Nectarine Administrative Committee, and the Pear Program Committee, the term CTFA is defined to mean Order 917, and it is agreed that the Control Committee of Order 917 will provide all paid staff services and facilities for Order 916 and a California State Processed Pear Marketing Order through a somewhat complicated arrangement whereby the latter two Marketing Order Committees have input into the staff hiring and other expenditures (through a joint Management Services Committee). The staff employees paid under this arrangement are sometimes referred to as the CTFA, or the CTFA staff.

Wileman I, Judicial Officer's Opinion at 57-58.

If plaintiffs employ the term CTFA synonymously with Marketing Order 917, it is authorized. If CTFA is meant to refer to the committees, they too have been authorized. If it refers to employees hired by the committees to help administer the marketing orders, their employment also has been authorized.[46] There is no prohibition against committees hiring employees and using a name, CTFA, to designate functionaries of the committees. There similarly appears to be no bar to the committees entering into agreements to share the same administrative staff.

The powers of such employees are delineated by the marketing orders. Employees may implement the Secretary's regulations only as authorized by the committees. To the extent that plaintiffs allege that certain employees exceeded this authority and took actions to harm plaintiffs' interests, these claims have been heard in a separate lawsuit.

H. *Administrative Process as a Denial of Due Process*

Plaintiffs finally allege that they were denied due process rights by a requirement that they exhaust administrative remedies under section 608c(15)(A). Plaintiffs specifically allege that the lack of a post-deprivation remedy and the Secretary's delay in ruling on the appeal of the ALJ's decisions constitute violations of due process. As to the first issue, plaintiffs contend that the Supreme Court's decision in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), stands for the proposition that, in challenging the imposition of assessments, they are entitled to either a pre-deprivation hearing or a post-deprivation remedy. This issue is moot. It has

[46]Both marketing orders list among the duties of the committees: "To appoint such employees, agents and representatives as it may deem necessary, and to determine the compensation and define the duties of each." 7. C.F.R. § 916.31(b); 917.34(d).

been determined above that plaintiffs would have been entitled to a post-deprivation refund of their assessments had the illegality of the assessment regulations been established.

As to the issue of delay, the tortuous course of events of this dispute has previously been noted at the appellate level and by this Court. The Ninth Circuit found these delays to be "appalling." *Wileman Bros. & Elliott, Inc., v. Yeutter,* 87-2938, unpublished opinion of October 29, 1990 (9th Cir.). Each of the two proceedings took more than three years, from time of filing to issuance of the Judicial Officer's final order.[47]

Delay naturally resulted from the two-step review procedure established under the AMAA and was exacerbated by disputes between the ALJ and the Judicial Officer. Much of the delay was caused by the actions of plaintiffs. The thousands of pages of testimony adduced at the administrative hearings, as well as the hundreds of pages of briefs filed in this Court by plaintiffs, have placed a considerable burden on the tribunals hearing the case. Four hundred sixty-five exhibits were introduced at the two administrative hearings, which lasted a total of 29 days. Plaintiffs exhaustively argued every possible procedural, regulatory, and constitutional point, all of which had to be heard, considered and decided. This is not to suggest that plaintiffs proceeded in bad faith, but rather to note that their method of litigating the case naturally led to significant delays. This Court has required over nine months to review and decide these voluminous and complex motions for summary judgment. While, in retrospect, all parties concerned could and should have taken steps to shorten the process, each has contributed to

[47]The first (15)(A) petition was filed more than five and one-half years ago on April 20, 1987. The first administrative proceeding (Wileman I) was not concluded until July 9, 1990. The second proceeding (Wileman II) began with plaintiffs' filing on June 6, 1988 and concluded on September 30, 1991.

the delay. Under these circumstances, that delay has not resulted in a denial of due process.

IV. CONCLUSION

Plaintiffs' motion for summary judgment is DENIED. The sums held in the trust accounts of plaintiffs' counsel shall be disbursed to the Secretary.

Defendant's motion for summary judgment is GRANTED. Defendants shall lodge an order with the Court within five (5) days in conformance with this decision.

SO ORDERED.

DATED: January 27, 1993.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Case No. CV-F-40-473 OWW

Consolidated with
CV-F-88-568 OWW
CV-F-87-392 OWW
CV-F-90-088 OWW
CV-F-91-318 OWW
CV-F-91-319 OWW

WILEMAN BROTHERS & ELLIOTT, INC., A CALIFORNIA CORPORATION; AND KASH, INC., A CALIFORNIA CORPORATION, *PLAINTIFFS,*

V.

MICHAEL ESPY[1], SECRETARY OF AGRICULTURE, *DEFENDANT.*

Case No. CV-F-91-625 OWW

GERAWAN FARMING, INC., A CALIFORNIA CORPORATION, *PLAINTIFF,*

VS.

MICHAEL ESPY, SECRETARY OF AGRICULTURE, *DEFENDANT.*

[1]Michael Espy, Secretary of Agriculture, is hereby substituted for Edward Madigan pursuant to Federal Rules of Civil Procedure, Rule 25(d)(1).

Case No. CV-F-91-686 OWW

ASAKAWA FARMS, ET AL. *PLAINTIFFS,*

VS.

MICHAEL ESPY, SECRETARY OF AGRICULTURE, *DEFENDANT.*

Lead Case No.:
CV-F-92-5185 OWW

Consolidated Cases:
CV-F-92-5186 OWW
CV-F-92-5187 OWW
CV-F-92-5188 OWW
CV-F-92-5189 OWW
CV-F-92-5190 OWW
CV-F-92-5191 OWW
CV-F-92-5192 OWW

UNITED STATES OF AMERICA, *PLAINTIFF,*

V.

SHIG NAGAO, *DEFENDANT.*

ORDERS AND JUDGMENT

Whereas the following cases are currently pending before this Court:

(1) CV-F-90-473 OWW, wherein Wileman Bros. & Elliott, Inc. and Kash, Inc. seek judicial review under § 15(B) of two 15(A) Administrative petition decisions issued by the Secretary, challenging the use of color chips and the well-matured maturity standard for peaches, plums and nectarines; size elimination regulations, and the legality of advertising and other assessments; among other issues.

(2) CV-F-87-392 OWW, wherein Wileman Bros. & Elliott, Inc. and Kash, Inc. seek an injunction against the Secretary of Agriculture prohibiting the use of color chips and the well-matured standard for peaches, plums and nectarines;

(3) CV-F-91-625 OWW, wherein Plaintiff Gerawan Farming, Inc. seeks 15(B) judicial review of the 15(A) administrative petition ruling issued by Defendant Secretary of Agriculture involving issues similar to those addressed by Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) proceeding described above;

(4) CV-F-88-568 OWW, wherein Plaintiff USA seeks peach, plum and nectarine assessments for the harvest seasons of 1987 and 1988 against Wileman Bros. & Elliott, Inc. and Kash, Inc.

(5) CV-F-90-088 OWW, wherein Plaintiff USA seeks against Wileman Bros. & Elliott, Inc., Kash, Inc., and Gerawan Farming, Inc. peach, plum and nectarine assessments for the 1989 and 1990 harvest seasons; and for peaches and nectarines harvested during 1991 and 1992. This suit also involved the Court's denial of the Secretary's request for preliminary injunction against Gerawan to mandate compliance with the Secretary of Agriculture's size elimination regulations for nectarines and peaches on the ground that such request was moot at the time of the hearing;

CV-F-88-569 OWW and CV-F-90-088 OWW also involved the Court's Order and a stipulation between the parties for the holding of all assessments in an attorney-client trust fund account pending the final determination as to the validity of the marketing order provisions which are challenged in the 15(B) proceedings (CV-F-90-473 OWW and CV-F-91-625 OWW).

(6) CV-F-91-318 OWW and CV-F-91-319 OWW, wherein the Court denied USA's request for a preliminary injunction to compel Wileman Bros. & Elliott, Inc. and

Kash, Inc. to submit to the use of color chips and the well-matured standard and to pay assessments out of trust prior to the finality of the 15(B) litigation;

(7) CV-F-91-686 OWW, wherein Plaintiffs Asakawa Farms, Chiamori Farms, Phillips Farms, Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms seek 15(B) review against the Secretary of Agriculture's ruling on their various 15(A) administrative petitions which raise similar issues as those involved in the Wileman and Kash 15(B) proceeding described above;

(8) CV-F-92-5185 OWW, wherein USA seeks against Nagao Farms, for advertising and other assessments for the 1990 harvest season, $5,325.86, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(9) CV-F-92-5186 OWW, wherein USA seeks against Nilmeier Farms, for advertising and other assessments for the 1990 harvest season, $6,034.77; and 1991 assessments in the amount of $3,782.84, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(10) CV-F-92-5187 OWW, wherein USA seeks against Phillips Farms, for advertising and other assessments for the 1990 harvest season, $41,541.74; 1991 assessments in the amount of $5,786.09; and 1992 assessments in the amount of $10,361.08, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(11) CV-F-92-5188 OWW, wherein USA seeks against Wilmer Huebert Farms, for advertising and other assessments for the 1990 harvest season, $9,647.07; and 1991 assessments in the amount of $316.47, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(12) CV-F-92-5189 OWW, wherein USA seeks against Kobashi Farms, for advertising and other assessments for the 1990 harvest season, $10,312.65; 1991 assessments in

the amount of $5,513.26; and 1992 assessments in the amount of $7,131.59, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(13) CV-F-92-5190 OWW, wherein USA seeks against George Huebert Farms, for advertising and other assessments for the 1990 harvest season, $9,910.59; 1991 assessments in the amount of $802.95; and 1992 assessments in the amount of $3,637.78, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(14) CV-F-92-5191 OWW, wherein USA seeks against Mihara Farms, for advertising and other assessments for the 1990 harvest season, $6,590.97; and 1991 assessments in the amount of $1,788.52, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;

(15) CV-F-92-5192 OWW, wherein USA seeks against Kobashi Farms, Inc., for advertising and other assessments for the 1991 harvest season, $15,099.50; 1991 assessments in the amount of $8,582.41; and 1992 assessments in the amount of $13,318.30, plus a 10% surcharge pursuant to 28 U.S.C. § 3011;[2]

WHEREAS, the parties to all of the aforementioned cases have agreed that the cases should be consolidated, and good cause appearing therefore,

IT IS ORDERED that all of the aforementioned cases are hereby consolidated with Lead Case No. CV-F-90-473 OWW. It is further stipulated and agreed by all parties and hereby ordered that Gerawan Farming, Inc.'s 15(B) proceeding, the assessment collection action as related to Gerawan (CV-F-90-088 OWW), the 13 handlers' 15(B) proceeding (CV-F-91-686 OWW) and the assessment collection action against the 8 remaining handlers (Consolidated Case No. CV-F-92-5185 OWW) shall be governed by the findings and judgment as Wileman Bros. & Elliott,

[2]By Order dated April 15, 1993, the Court ordered the cases listed in paragraphs (8) through (15) consolidated for all purposes, under Lead Case No. CV-F-92-1585 OWW.

Inc. and Kash, Inc. receive in their appeal of the 15(B) consolidated proceeding.

Regarding Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) proceeding, Case No. CV-F-90-473 OWW, the Court having considered the cross-motions for summary judgment and having heard oral arguments on March 13, 1992, the Court on January 27, 1993, issued a Modified Memorandum Opinion and Order Re Cross-Motions for Summary Judgment. For the reasons expressed therein, summary judgment is hereby entered in favor of the Secretary of Agriculture and Plaintiffs Wileman Bros. & Elliott, Inc. and Kash, Inc.'s 15(B) complaint is dismissed with prejudice.

As the 15(B) actions brought by Gerawan Farming, Inc. (Case No. CV-F-91-625 OWW) and Asakawa Farms, et al. (CV-F-91-686 OWW) raise the same issues decided by the Court in the cross-motions for summary judgment in Case No. CV-F-90-473 OWW, judgment is entered in favor of the Secretary of Agriculture in those actions, and the complaints of Gerawan Farming, Inc. and Asakawa Farms, et al. are dismissed with prejudice for the reasons set forth in the Court's Modified Memorandum Opinion and Order re: Cross-Motions for Summary Judgment, issued on January 27, 1993, in Case No. CV-F-90-473 OWW.

Regarding all of the aforementioned assessment collection actions wherein the United States is listed as the only named plaintiff, pursuant to Fed. R. Civ. P. 17, it is ordered that the Nectarine Administrative Committee of Marketing Order 916 and the Control Committee for the Peach and Plum Committees of Marketing Order 917 are hereby added as Plaintiffs in Case Nos. CV-F-88-568 OWW, CV-F-90-088 OWW, CV-F-92-5185 OWW, CV-F-92-5186 OWW, CV-F-92-5187 OWW, CV-F-92-5188 OWW, CV-F-92-5189 OWW, CV-F-92-5190 OWW, CV-F-92-5191 OWW, and CV-F-92-5192 OWW (hereinafter referred to as "the collection actions").

The USA, the Nectarine Administrative Committee and the Control Committee for the Peach and Plum committees moved for summary judgment against Wileman Bros. & Elliott, Inc. and Kash, Inc. in collection actions CV-F-88-568 OWW and CV-F-90-088 OWW, and against Gerawan Farming, Inc. in CV-F-90-088 OWW. However, summary judgment has not been granted in the collection action against Gerawan in CV-F-90-088 OWW, nor sought in the other eight (8) handlers collection actions, i.e. CV-F-92-5185 OWW, CV-F-92-5186 OWW, CV-F-92-5187 OWW, CV-F-92-5188 OWW, CV-F-92-5189 OWW, CV-F-92-5190 OWW, CV-F-92-5191 OWW and CV-F-92-5192 OWW.

With respect to that portion of the government's assessment collection complaints wherein USA seeks injunctive relief, i.e. CV-F-88-568 OWW and CV-F-90-088 OWW, all such injunction requests were withdrawn by the United States.

It is ordered that judgment for the United States, the Nectarine Administrative Committee and the Control Committee shall issue in the above-referenced collection actions as to the principal sum prayed for. The 10% surcharge, sought pursuant to 28 U.S.C. § 3011, where prayed for in the government's collection complaints, has been withdrawn by the United States.

The assessment monies, presently held in trust accounts maintained by the handlers' counsel, The Law Firm of Thomas E. Campagne, shall be transferred to, and held in trust by, the Registry of the Court until the affirmative defenses to the collection actions are adjudicated to finality via appeal of the 15(B) proceeding in CV-F-90-473 OWW. Therefore, the execution of the below stated monetary judgments are stayed pending any/all appeals through the Ninth Circuit and the U.S. Supreme Court. Should the handlers prevail in total or in part with respect to the 15(B) proceedings these judgments may be modified and/or set

aside prior to the ultimate distribution of the funds, as determined by the Court.

Judgment in the following amounts is hereby entered against each below listed handler with respect to each individual handler's assessment obligation for the specified harvest seasons:

	1987/88	*1989*	*1990*	*1991*	*1992*	*Total*
Wileman Bros. & Elliott, Inc.	196,375.63	134,022.15	111,269.97	21,019.77	31,753.90	494,441.42
Kash, Inc.	137,939.73	78,855.12	105,446.00	51,873.22	90,432.54	464,546.61
Gerawan Farming, Inc.		645,391.79	532,593.10	343,755.57	456,958.88	1,978,699.34
George Huebert Farms			9,910.59	802.95	3,637.78	14,351.32
Wilmer Huebert Farms			9,647.07	316.47		9,963.54
Kobashi Farms			10,312.65	5,513.26	7,131.59	22,957.50
Kobashi Farms, Inc.			15,099.50	8,582.41	13,318.30	37,000.21
Mihara Farms			6,590.97	1,788.52		8,379.49
Nagao Farms			5,325.86			5,325.86
Nilmeier Farms			6,034.77	3,782.84		9,817.61
Phillips Farms			41,541.74	5,786.09	10,361.08	57,688.91
					Grand Total:	$3,103,171.81

Pursuant to stipulation of the parties, the prevailing party in the 15(B) litigation shall be entitled to all interest accrued in the trust accounts to date and all interest actually accrued on the assessment monies maintained in trust accounts upon release of the assessments following all appeals of the 15(B) proceedings. As stipulated, the prevailing parties shall not be entitled to any pre- and/or post-judgment interest other than that actually earned by the trust fund accounts.

The handlers' counsel shall deposit from its attorney-client trust fund accounts all principal sums and actual interest earned on said principal sums with the Registry of the Court. Said trust transfer to the Registry of the Court shall occur within seven (7) business days of the entry of these Orders and Judgment. Within fifteen (15) business days of said entry, the trustee of those accounts, The Law Firm of Thomas E. Campagne, a Professional Corporation, shall file with the Court and counsel of record an

accounting of the trust funds transferred to the Registry of the Court, including the principal and the actual interest earned at the time of transfer. Such account shall specify the dates on which such principal amounts were deposited in the attorney-client trust acccunts. The Law Firm of Thomas E. Campagne is only responsible for depositing in the Registry of the Court the principal sums (and interest actually earned thereon) provided by each handler for deposit into the attorney-client trust fund accounts. Any discrepancy between the judgment entered and the principal maintained in the attorney-client trust accounts, as to each handler, if any, is the responsibility of the specific handler. Any such additional amounts shall be deposited by the handler in the Registry of the Court within fifteen (15) business days of entry of these Orders and Judgment. Pursuant to stipulation of the parties, all principal sums and actual interest earned shall remain in the Registry of the Court until final judgment is entered following all appeals.

It is further ordered that Defendants Wileman Bros. & Elliott, Inc., Kash, Inc., Gerawan Farming, Inc., George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Kobashi Farms, Inc., Mihara Farms, Nagao Farms, Nilmeier Farms and Phillips Farms, shall deposit all assessments attributable to their 1993 peaches and nectarines with the Registry of the Court on or before the date such assessments would otherwise be paid to the Nectarine Administrative Committee (nectarines) and the Control Committee (peaches). In the event that the Ninth Circuit has not decided Defendants' appeal before the 1994 harvest season, all assessment attributable to the 1994 harvest and future harvest seasons shall be deposited with the Registry of the Court on or before the date such assessments would otherwise be paid to the Nectarine Administrative Committee (nectarines) and the Control Committee (peaches)], said monies to remain in trust in the

Registry of the Court until such time as final judgment on these consolidated 15(B) and assessment actions is entered following any/all appeals to the Ninth Circuit and the U.S. Supreme Court. The United States, the Nectarine Administrative Committee and the Control Committee shall seek leave of Court to amend this judgment to include such later seasons without the necessity of filing a new complaint.

Regarding Case Nos. CV-F-91-318 OWW and CV-F-91-319 OWW, said actions are dismissed without prejudice.

Regarding Case No. CV-F-88-392 OWW, said case is dismissed without prejudice.

Dated: September 10, 1993

OLIVER W. WANGER, JUDGE
UNITED STATES DISTRICT
COURT

Presented By:

The Law Firm Of Thomas E. Campagne
A Professional Corporation

By _____
Thomas E. Campagne

Approved as to Form:

Robert M. Twiss
U.S. Attorney

By _____
Catherine E. Basham
Special Assistant U.S. Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CV-F-90-473-OWW

CONSOLIDATED WITH
CV-F-88-568-OWW
CV-F-87-392-OWW
CV-F-90-088-OWW
CV-F-91-318-OWW
CV-F-91-319-OWW

WILEMAN BROS. & ELLIOTT, INC.; AND KASH, INC.,
Plaintiffs

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE,
Defendant

ORDER AFTER HEARING

The cross-motions for summary judgment of plaintiffs Wileman Bros. and Elliott, Inc., and Kash, Inc. and defendant Edward Madigan, Secretary of Agriculture, came on regularly for hearing on March 13, 1992: The Court having considered all the pleadings and oral argument presented,

IT IS ORDERED that the plaintiffs' motion for summary judgment is denied;

IT IS FURTHER ORDERED that the defendant's motion for summary judgment is granted;

IT IS FURTHER ORDERED, as the parties have an apparent dispute over the amount of assessments which

should be remitted to the Secretary of Agriculture, the defendant shall file a brief within ten (10) days stating the amount of assessments owed by plaintiffs. Defendant shall provide documentation which establishes the amount owed as to each type of fruit for each harvest season in question and an explanation of the method of calculation of assessments for each season.

Plaintiffs' response shall be filed no later than five (5) days from date of service of defendant's brief.

SO ORDERED.

DATED: February 2, 1993.

Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES
DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. F&V 916-3
AMA Docket No. F&V 917-4

Decision and Order

IN RE:

WILEMAN BROS. & ELLIOTT, INC.,
A CALIFORNIA CORPORATION,

AND

KASH, INC.,
A CALIFORNIA CORPORATION, *PETITIONERS*

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Preliminary Statement

This proceeding (*Wileman II*) was instituted by Petitions filed pursuant to § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (the "Act"), as amended (7 U.S.C. § 608c(15)(A)), relating to the Federal Marketing Orders Regulating the Handling of Nectarines Grown in California (7 C.F.R. Part 916) and Fresh Pears, Plums, and Peaches Grown in California (7 C.F.R. Part 917).[1] Petitioners complain as to the assessments imposed against them involving nectarines, plums and peaches, as to the maturity and size regulations, and as to the Department's practice and procedure involving § 8c(15)(A) proceedings. A Decision and Order was filed July 9, 1990, in a similar proceeding involving the identical parties and a number of the identical issues (*In re Wileman Bros. & Elliott, Inc. (Wileman I)*, 49 Agric. Dec. 705 (1990), *appeal docketed*, No. CV F 90-473 EDP (E.D. Cal. July 27, 1990) (referred to as *Wileman I*)). *Wileman I* and *Wileman II* were consolidated by the Judicial Officer's Order of April 6, 1990, but separated by his Order of September 18, 1991.

On May 29, 1991, Administrative Law Judge Dorothea A. Baker (ALJ) filed an Initial Decision and Order in which she agreed with petitioners' arguments, and held (Initial Decision at 369):

> The Petitioners are to be relieved of the Order obligations of which they complained in their Petition and Amended Petition. The amount of such monetary relief is to be determined at a subsequent date.

On July 31, 1991, respondent appealed to the Judicial Officer, to whom final administrative authority to decide

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[1] *See generally* Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, §§ 2.01-.15, 2.46-.58 (1981 and 1989 Cum. Supp.).

the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 235).[2] On August 9, 1991, the case was referred to the Judicial Officer for decision.[3]

Based on a careful examination of the record, including those portions which I regard as not a proper part of the record (see §§ III, IV, *infra*), I find no merit in petitioners' contentions and, therefore, I am dismissing the Petitions. *The Findings of Fact are the same as those made by the ALJ, with a few minor editorial changes, and with omissions shown by dots and additions included within brackets.* I have omitted many findings which I regard as irrelevant or not supported by the record, but I have included many other findings which I regard as irrelevant, but supported by the record. Specifically, I am in agreement with the attachment to respondent's appeal brief as to the ALJ's findings, but I have included many "irrelevant" findings which respondent would omit.

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

[3]Previously, the Judicial Officer had spent considerable time studying the record in *Wileman II*, primarily during the period when he was preparing to issue a Recommended Decision without having the ALJ first decide the case, in an effort to expedite the matter. See *In re Wileman Bros. & Elliott, Inc.*, 49 Agric. Dec. 102 (Apr. 6, 1990) (Order Consolidating Proceedings and Denying Motion to Recuse, and directing ALJ to issue expedited Recommended Decision); Order filed July 10, 1990 (unpublished, stating that Judicial Officer will issue Recommended Decision, rather than the ALJ); 49 Agric. Dec. 835 (Aug. 21, 1990) (Further Notice as to Issuance of Recommended Decision in *Wileman II*, directing the ALJ to issue the Recommended Decision promptly).

Findings of Fact

1. Petitioner Wileman Bros. & Elliott, Inc., is a California corporation incorporated on May 10, 1948, and has a principal place of business located at 40232 Road 128, Cutler, California. Its mailing address is P.O. Box 309, Cutler, California 93647.

2. Petitioner Kash, Inc., is a California corporation, incorporated on May 28, 1968, and has a principal place of business located at Parlier, California. Its mailing address is P.O. Box 310, Parlier, California 93648.

3. Petitioner Wileman Bros. & Elliott, Inc., hereinafter, for convenience purposes sometimes referred to as Petitioner Elliott, and Petitioner Kash, Inc., hereinafter sometimes referred to as Petitioner Kash, are both growers and handlers of Plums and Nectarines. Petitioners handle their own varieties of Plums and Nectarines as well as that of outside growers' varieties of Plums and Nectarines.

4. Petitioner Kash, Inc., is also both a grower and a handler of Peaches.

5. Petitioner Elliott is the only commercial grower and handler of Tom Grand Nectarines. Petitioner Elliott is one of two growers of Ebony Plums and one of two handlers of Ebony Plums, and grows and handles a significantly greater volume of Ebony Plums than the one other grower of Ebony Plums.

6. Petitioner Elliott, as a corporation, has been a handler of Nectarines and Plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of Nectarines, Plums, and Peaches since 1968.

7. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc., subsequent to the granting of a Motion to Consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February-March of 1988 [(*Wileman I*)]. Said hearing was presided over by Dorothea A. Baker, Administrative Law Judge, United States

Department of Agriculture, in case No. AMA Docket Nos. F&V 916-1, 917-2, 916-2 and 917-3. Said (15)(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for Nectarines and Plums. That proceeding raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and factual evidence which was admitted through judicial/official, and administrative notice being taken by the Administrative Law Judge. The Initial Decision rendered by the Administrative Law Judge on May 19, 1989, was reversed in substantial respect by the Department's Judicial Officer on July 9, 1990, wherein he found that the Petitioners were not entitled to any relief and dismissed their Petitions.

8. On or about May 4, 1988, the Nectarine Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Nectarines packed by [handlers, including] Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of Nectarines, and over 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; production research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May 1988 was approximately One Million Seven Hundred Sixty-one Thousand Eight Hundred Eighty-six Dollars ($1,761,886.00).

9. From 1980 through the present harvest season, over half of the assessments, imposed by the Nectarine

Administrative Committee, have been used for "Market Development."

10. On or about May 4, 1988, the Plum Administrative Committee recommended the adoption of a 19 cents per carton assessment against each container of Plums packed by [handlers, including] Petitioners. Of that 19 cents, only (approximately) 6 cents was for inspection of those cartons of Plums and approximately 10 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales materials; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May 1988 was approximately One Million Eight Hundred Thirty-one Thousand Four Hundred Fifty-nine Dollars ($1,831,459.00). From 1980 through the present harvest season, over half of the aforementioned assessments have been used for "Market Development."

11. On or about May 4, 1988, the Peach Administrative Committee recommended the adoption of an 18 cents per carton assessment against each container of Peaches packed by [handlers, including] Petitioner, Kash, Inc. Of that 18 cents, only (approximately) 6 cents was for inspection of Peaches and approximately 9 cents was assessed against each container for "Market Development," which included: field staff activities; retail advertising incentives; trade communications; retail projects; point of sales material; publicity; educational activities; food service activities; T.V. and radio production; T.V. advertising; radio advertising; outdoor advertising; Canadian promotions; promotion research; merchandising research; promotion expense; Hispanic promotion;

and miscellaneous. The total budget adopted by the Peach Administrative Committee in May 1988 was approximately One Million Two Hundred Twenty-five Thousand Four Hundred Thirty-five Dollars ($1,225,435.00). Regarding said Peach assessments, from 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc., have been used for "Market Development."

12. Approximately five to six cents per container is currently being assessed against Petitioners to provide for inspection services (performed by the Shipping Point Inspection), to inspect fruit.

13. Any monies expended by Petitioners for promotion of their specific brand of fruit receives no *pro rata* credits toward the amount of advertising assessments levied against Petitioners.

14. California's tree fruit handlers, subject to Marketing Orders 916 and 917, are the only tree fruit handlers subject to advertising assessments. Other State's handlers are not required to advertise under Federal Marketing Orders.

15. On April 8, 1988, the Secretary of Agriculture issued proposed rules with respect to Plum sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 11,669).

16. On April 18, 1988, the Secretary of Agriculture issued proposed rules with respect to Nectarine and Peach sizes, maturity, and requests for variances, which proposed rules sought to define the term "well-matured" (53 Federal Register 12,690, regarding Nectarines); (53 Federal Register 12,694, regarding Peaches).

17. With respect to the Peach, Plum and Nectarine proposed rules described in the immediately preceding two stipulations (Paragraphs 15 and 16), a fifteen-day comment period was provided [for peaches and nectarines, and a seventeen-day comment period was provided for] Plums, for which a seven-day extension was granted.

18. Said proposed rules, with respect to Peaches, Plums and Nectarines, were issued four months after the respective Peach, Plum and Nectarine Committees met in December 1987.

19. No documents [are relied on by Respondent to] support Respondent's position that "color chips" objectively, rationally, and reasonably evaluate and test the actual internal maturity of fruit, *other than the rulemaking record produced in this proceeding.* (Contained in Exhibit Nos. 31, 32 and 33, and all subparts thereto.)

20. ...

21. The following documents do not exist (*other than to the extent they may be in the rulemaking record*) produced in this proceeding:

> (1) No documents exist regarding the Secretary's consideration, if any, during the 1980 harvest season through the 1987 harvest season, of *other possible testing devices,* other than "color chips," for measuring the internal maturity of Peaches, Plums and/or Nectarines; and
>
> (2) No documents exist other than the rulemaking record showing that the "color chips" selected for each particular variety of Peaches, Plums and Nectarines, were objectively and rationally tested and evaluated to judge the internal maturity of that particular variety of fruit.

22. [In addition to] the aforesaid rulemaking record, identified as Joint Exhibits 31 and 32, the *Respondent relies upon [the experience and expertise of the personnel who administered the Orders] to support each and every particular "color chip"* which was designated and selected by Respondent for each variety of Plum, for each variety of Nectarine, and for each variety of Peach during the 1988 and 1989 harvest seasons.

23. Other than what is contained in Joint Exhibits 31 and 32, there are no documents, studies or reports regarding the Secretary's consideration of any other testing devices, other than "color chips," to test the internal maturity of Peaches, Plums and Nectarines, for the 1988 and 1989 harvest seasons.

24. The rulemaking record (Exhibits 31, 32, and 33, and all subparts thereto) does not include "color chips," in the physical sense....

25-28. ...

29. The following request was made: the rulemaking record upon which Respondent relies to support its position that advertising assessments have satisfied the requirements of the Administrative Procedure Act from 1980 through the present with regard to Peaches, Plums and Nectarines. The stipulated response to this request was that *Joint Exhibit 33 is the entire rulemaking record with respect to advertising for the harvest seasons 1980 through 1987.* The Respondent reserved the right to reference the 1971 formal rulemaking procedure which occurred when the Peach, Plum and Nectarine Marketing Orders were amended on or about 1971, after the Act was amended on or about 1965.

30. A stipulated response was made to the request for those documents relating to the extent, if any, the Secretary of Agriculture provided a *"substantial basis and purpose statement"* as required by the Administrative Procedure Act, regarding the *assessment rates from 1980 through the present with regard to* the advertising assessments applicable to Peaches, Plums and Nectarines. The stipulated response was: The Secretary relies upon Joint Exhibits 31, 32 and 33.

31. The Respondent admits that the Secretary's imposition of "final rules" regarding assessments for Peaches, Plums and Nectarines for the years 1980 through 1987 was not preceded by "proposed rules" allowing for a thirty-day notice and comment period.

32. Respondent admits that the "proposed rules" issued in 1988 regarding Peach, Plum and Nectarine assessment rates did not provide for a thirty-day notice and comment [period].

33. Joint Exhibits 31, 32 and 33 are the only documents, and constitute the entire rulemaking record, regarding expenses and advertising assessments for Peaches, Plums and Nectarines commencing with the 1980 harvest season through the present. (Tr. 737). With respect to that acknowledgment, the Respondent reserved the right to reference the rulemaking records.

34. The Respondent denied the assertion that the rulemaking record (Joint Exhibits 31, 32 and 33 and all subparts thereto) failed to establish that the Secretary of Agriculture ever engaged in notice and comment as to whether or not to advertise or *in* what manner to advertise. Production of the Joint Exhibits 31, 32, and 33, and their subparts, constitutes the sole basis for the Respondent's response to the effect that the Secretary abided by the Administrative Procedure Act, with the Respondent reserving the right to explain the documents contained therein by referencing the "formal" rulemaking record of 1971 when the Peach, Plum and Nectarine Marketing Orders were amended....

35. The Respondent admitted the following stipulation, with the exception noted below. The admission is:

> Respondent admits that, from the 1980 season through and including the present, the Secretary of Agriculture has never provided any notice and comment and given no statement in the Federal Register whatsoever, with respect *to how much of the assessments for peaches, plums and nectarines were earmarked to be utilized for advertising, promotion and production research.* (Emphasis added).

The Respondent admitted the above except as regards the language contained within the proposed and final rules for the 1988 and 1989 seasons. (Tr. 743).

36. The Respondent admits the following statement, with reservation to the Respondent, of the right to reference the formal rulemaking record of 1971. The admitted statement is as follows:

> Respondent admits that, from the 1980 season through the present, with respect to peaches, plums and nectarines, the Secretary of Agriculture has never published in the Federal Register any statement with regard to his determination that advertising is beneficial to the handler or that generic advertising is beneficial to the handler and/or beneficial to the grower, other than the Secretary making the following statement—"It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the Act"—***.

37. The Respondent admits the following statement reserving unto the Respondent the right to explain said admissions with respect to the year 1988 and 1989 harvest seasons and to the mention in Respondent's post-hearing brief that this was a publication in 1988 and 1989 that gave notice, although not specifically with respect to those items. The Respondent reserved the right to argue that the notice that was provided would "somehow have allowed for that type of comment." The admission of the Respondent is to the following:

> From the 1980 season through the present, the Secretary of Agriculture has never published in the Federal Register any notice and comment opportunity regarding how the

> generic advertising program for peaches, plums, and nectarines should be assessed, i.e., on a per carton basis versus a per acre basis.

....

38. The Respondent relies solely upon Joint Exhibits 31, 32 and 33 [and the formal rulemaking records] to support its denial of the following:

> That an assessment based on a per carton basis rather than per acre, discriminates against some varieties of fruit which produce more cartons per acre at a lower F.O.B. price compared to those other varieties which produce fewer cartons per acre at a higher F.O.B. price.

39-40. ...

41. Joint Exhibits 31 and 32 constitute the entire rulemaking record upon which Respondent bases its contention that the regulation of Nectarine and Peach sizes was appropriate for the 1988 and 1989 harvest seasons.

42–44....

45. The *entire budget approval documentation,* as to Peaches, Plums, and Nectarines, is set forth and stipulated into evidence as being incorporated within Exhibit 297, and all its subparts.

46. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Nectarine Committee, for the harvest seasons 1980 through 1989 provided to the Secretary of Agriculture for his approval [, except as previously submitted in *Wileman I*].

47. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and

all other assessments) which the Plum Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval [, except as previously submitted in *Wileman I*].

48. Joint Exhibit 33, and its subparts, contain the proposed assessments (including expense, advertising and all other assessments) which the Peach Committee, for the harvest seasons 1980 through 1989, provided to the Secretary of Agriculture for his approval.

49. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Nectarine Administrative Committee meetings from 1980 through 1989 [, except as previously submitted in *Wileman I*].

50. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Plum Commodity Committee meetings from 1980 through 1989, [, except as previously submitted in *Wileman I*].

51. Joint Exhibits 31, 32, and 33, and all their subparts, contain all Minutes of the Peach Commodity Committee meetings from 1980 through 1989.

52. The Respondent admits with respect to Peaches, Plums and Nectarines, that no other State in the United States of America, other than California, has an advertising assessment program under a Federal Marketing Order.

53. The Respondent admits that Peach, Plum and Nectarine growers in the State of Georgia do not have a United States Department of Agriculture/Agricultural Marketing Service advertising assessment Program.

54. The Respondent admits that the Peach, Plum and Nectarine growers in the State of Colorado do not have a United States Department of Agriculture/Agricultural Marketing Service Program.

55. ...

56. Respondent could not produce the "pink slips" of all non-personally owned automobiles driven by California Tree Fruit Agreement employees while "on duty" from

1980 through the present, because no such documents exist, because the California Tree Fruit Agreement, and the Commodity Committees, do not hold any pink slips nor any other title documents with respect to automobiles driven by the California Tree Fruit Agreement, since such titles have always been held by the Tree Fruit Reserve.

57. Respondent admits that the Peach Commodity Committee, the Plum Commodity Committee and the Nectarine Administrative Committee, acting through the California Tree Fruit Agreement, rent most of their furniture and equipment from the Tree Fruit Reserve, a California private, not-for-profit corporation.

58-59. ...

60. Exhibit 302 (radio 1988-1989) and Exhibit 303 (scripts used throughout the U.S. 1986, 1987) are the scripts used on all California Tree Fruit Agreement—"California Summer Fruits" advertising promotions on radio and television stations throughout the United States when such advertising occurred during 1988 and 1989.... See also Exhibits 301 and 301(A) p. 8, 301(B) p. 9, 301(C) p. 10, 301(D) p. 11, as to script.

61. Respondent's response to the last paragraph, Paragraph No. 60, and Exhibits 301, 302, and 303, constitute the advertising scripts (i.e. the words used during all advertisements, with respect to advertisements) paid for by either the Peach, Plum and/or Nectarine Committees or with respect to advertisements for which any of those Committees contributed any funds whatsoever for all advertisements conducted during the harvest seasons 1980 through and including 1989.

62-64. ...

65. Respondent relies on the 1965 and 1971 formal rulemaking records and Exhibit Nos. 31, 32, and 33, and all subparts thereto, as furnishing the basis in support of Respondent's contention that the Secretary of Agriculture has considered, or not, the problems encountered by an

East Coast consumer differentiating or distinguishing between a Georgia or Colorado Peach (which is not subject to United States Department of Agriculture/Agricultural Marketing Service advertising assessments) from that of a generically advertised California Peach; and, as such, the aforesaid data constitute the entire rulemaking records and Departmental documents, if any, with respect to studies and analyses of the [alleged] discrimination that California Peach, Plum and Nectarine handlers suffer by paying for a nation-wide advertising program that benefits growers and handlers in other states who are not so assessed.

66. The Respondent admits that on or about April 18, 1988, the Secretary of Agriculture issued Proposed Rules with respect to the proposed regulation of Nectarine and Peach sizes, maturity determinations, color chip procedures, and variances from maturity determinations. (See 53 Federal Register 12,690, regarding Nectarines; and see 53 Federal Register 12,694, regarding Peaches.) A fifteen-day comment period was provided. Respondent now contends that a "good cause" exception to the thirty-day effective date existed, but there was no good cause exception regarding the comment period because the Administrative Procedure Act "has no requirement of a particular 30-day comment period." Respondent relies on Exhibits 31, 32, and 33.

67. Respondent relies on Exhibit 31, and its subparts, as being the full text of any and all reports and studies considered, and the entire rulemaking record, with respect to the regulation of Nectarine size, the maturity standard, the designation of color chips, and the color chip variance procedures for the Interim Final Rules of May 27, 1988.

68. With respect to the May 27, 1988, Interim Final Rules issued regarding Peaches, Plums and Nectarines, Exhibit 31 constitutes any and all rulemaking documents.

69. Exhibit 31 contains the report of Ervin D. Thuerk as relied upon by the Secretary of Agriculture in the May, 1988, Interim Rules for Peaches, Plums and Nectarines.

70. Between the time of the proposed rule issued in April, 1988, and the Interim Final Rule issued in May of 1988, the Federal-State Inspection Service sent a letter to the Secretary of Agriculture/Agricultural Marketing Service regarding the Federal-State Inspection Service's comments to the proposed rulemaking. That letter is contained in Exhibit 31.

71. Regarding the May, 1988 Interim Rules, Exhibit 31 constitutes the entire rulemaking record and any and all other Department of Agriculture documents and communications involving the Secretary's regulation of Plum size, and the regulation of Nectarine and Peach sizes.

72. Respondent admits, regarding the May, 1988 Interim Rules for Peach, Plum and Nectarine maturity, color chips, and size regulation, that the Secretary did not allow 30 days after publication in the Federal Register before implementing the change, but instead claimed a "good cause" exception. Exhibit 31 constitutes any and all rulemaking records and other documents upon which the Secretary of Agriculture may rely for a "good cause" exception to a 30-day notice.

73. Regarding the April and May, 1988 Federal Registers with respect to Peaches, Plums, and Nectarines, Exhibit 31 constitutes all the rulemaking records.

74. Respondent denies that the current (15)(A) proceeding does not provide Petitioners with adequate and timely relief with respect to assessments.

75. The Respondent admits that there are no documents evidencing either a written lease or a rental agreement between California Tree Fruit Agreement and the owner/landlord, which is Tree Fruit Reserve for the building which California Tree Fruit Agreement uses as its headquarters, located at 701 Fulton Avenue, Sacramento, California. However, Respondent refers to the Management Services Minutes of various meetings which show rental amounts being charged.

76. No documents exist evidencing trademarks, registrations, copyrights, etc., for the "ripening bowl" sold and/or marketed by the California Tree Fruit Agreement.

77. Premised upon Respondent's assertions of *pending investigation,* Respondent did not adduce "all written reports of Shipping Point Inspection Inspectors regarding alleged violations of the California Tree Fruit Agreement color chip maturity requirements by Kash, Inc., during the month of June, 1989."

78. Premised upon Respondent's assertion of *pending ongoing investigations,* the Respondent produced some, but did not adduce "all notes or reports of interviews with Shipping Point Inspection Inspectors conducted by Gary Van Sickle, California Tree Fruit Agreement field agent, relating to alleged California Tree Fruit Agreement 'color chip' maturity violations at Kash, Inc., in June, 1989."

79. Respondent admits that no documents exist, such as receipts, invoices, and vouchers relating to the purchase by Gary Van Sickle of a refrigerator and couch to be placed in the California Tree Fruit Agreement office in Reedley.

80. No documents exist, such as rental agreements, between the California Tree Fruit Agreement and the Tree Fruit Reserve relating to the rental of the refrigerator and couch by the California Tree Fruit Agreement from the Tree Fruit Reserve during the calendar year 1989.

81. Respondent admits that no documents exist, including, but not limited, to expense sheets, vouchers, cancelled checks, etc., relating to any and all expenses paid by the California Tree Fruit Agreement with regard to Mr. Jonathan Field's and/or Karen Jackson's (or any other California Tree Fruit Agreement personnel) attendances at the Tree Fruit Reserve corporate meetings (meals, travel, hotel rooms, etc.).

82. With respect to the Tree Fruit Reserve's activities, the Respondent knows of no other documents in existence, other than those adduced and stipulated to at the oral hearing.

83. No documents exist which show notices, issued to the tree fruit industry, announcing the "open and public" Management Services meetings prior to the Commodity Committee meetings each season, for every year from 1980 through the present.

The foregoing Findings of Fact consist, for the most part, of stipulations and/or stipulated responses, and vast amounts of documentary evidence which were stipulated into the record.

In addition to the facts derived from the consolidation with this proceeding of *Wileman/Kash I* by the Judicial Officer, the aforesaid stipulations, stipulated responses, testimony and Exhibits, and the record as a whole, supports the following Findings of Fact numbered consecutively from Finding 83. ... [I]n *Wileman/Kash I* the Judicial Officer regarded many like findings as "irrelevant or based on improper legal conclusions," and, the Respondent's position is that such facts are beyond the scope of this proceeding....

84. The administration, regulatory interpretations, regulatory implementation, actions, or non-actions of the Committee members and/or the Secretary, through his subordinates, have a *direct, substantial, and ascertainable economic impact upon Petitioners.*

85. In 1937, Congress enacted a revised Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* The Agricultural Marketing Agreement Act, in its declaration of policy, conferred upon the Secretary of Agriculture the authority to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce, to establish and maintain parity prices for farmers, to protect the interest of the consumer, to establish and maintain production research (added in 1947), marketing research, maintain standards of quality, maturity and grading, as well as establishing inspection requirements, to establish and maintain such marketing conditions

as will provide, in the interests of producers and consumers, an orderly flow of commodities to the market through its normal marketing season (added in 1954), and to avoid unreasonable fluctuations in supplies and prices. (Title 7 U.S.C. § 602). Additionally, Congress specifically conferred upon the Secretary the power to "establish and maintain such production research, marketing research, and development projects *** as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

To achieve that goal, the Agricultural Marketing Agreement Act permits the Secretary of Agriculture to issue Marketing Orders and Agreements applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product. (Title 7 U.S.C. § 60[8]c). Section 608c of 7 U.S.C. directs the Secretary of Agriculture to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify and after the Secretary finds that the order's terms "will tend to effectuate the declared policy of the Act." 7 U.S.C. § 608c(4). Marketing Orders 916 and 917 (7 C.F.R. §§ 916 and 917) could not become effective until the respective Orders had been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet "greater stability in the products of agriculture." H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program "to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people." *Id.*, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3403.

Congress therefore adopted a bill which implemented a means to "encourage the expansion of markets and consumption at home and abroad." *Id.*

Toward that end, Congress amended the Agricultural Marketing Agreement Act authorizing the Secretary of Agriculture to promulgate Marketing Orders "[e]stablishing or providing for the establishment of marketing research and development projects designed to assist, improve or promote the marketing, distribution, and consumption of any such commodity or product, *the expense of such projects to be paid from funds collected pursuant to the marketing order.*" (Emphasis added). Agricultural Act of 1954, Pub. L. 83-690, § 401, 68 Stat. 906, 907 (1954), *codified* at 7 U.S.C. § 608c(6)(I). Authority to conduct "production research" and development projects, designed to "assist, improve or promote ... efficient production," was added in 1970. Pub. L. 91-292, 84 Stat. 333, June 25, 1970. *Authority for projects providing "for any form of marketing promotion including paid advertising"* for a specified commodity (cherries) was added in 1962. Pub. L. 87-703, 76 Stat. 632, Sept. 27, 1962. Plums and Nectarines were included in this category in 1965. Pub. L. 89-330, 79 Stat. 1270, November 8, 1965. California-grown Peaches (and *only* California-grown Peaches) were included in this category in 1971. Pub. L. 92-120, 85 Stat. 340, August 13, 1971. In making such amendments, Congress granted the Secretary of Agriculture permission and discretion to impose, if he deemed it proper, "any form of marketing promotion including paid advertising for Nectarines and Plums." (Petitioners' Exhibit AB, No. 18). At that time it was advised that the Department had not had any experience in the operation of an advertising program under Marketing Agreements and Orders. Such authority was deemed proper if advertising were to benefit the growers and meet the objectives of the Act and that the inclusion of the stated commodities

"would serve in providing experience now lacking in the [advertising] operation of Federal" Marketing Agreements and Orders.

86. When the Secretary promulgated the Nectarine Marketing Order in 1958, he made the following findings as to the Nectarine Administrative Committee, the agency that works with the Secretary in administering the order locally (23 Fed. Reg. 3007, 3010-12 (1958)):

> (b) It is desirable to establish an agency to administer the order locally under and pursuant to the act, as an aid to the Secretary in carrying out the declared policy of the act. The term "Nectarine Administrative Committee" is a proper identification of the agency and reflects the character thereof. It should be composed of 8 members. The members and alternates should be growers, or employees of growers.... Some growers of nectarines are corporations. These corporations and some of the larger individual growers have employees who are in complete charge of growing and marketing nectarines. Such employees would be qualified from the standpoint of knowledge and personal experience for service on the committee, and it would not be in the interest of the industry to deny them the opportunity to be nominated and to serve on the committee.... (23 Fed. Reg. 3010 (1958))
>
> ....
>
> The committee should be given those specific powers which are set forth in section 8c(7)(C) of the Act. Such powers are necessary to enable an administrative agency of this character to function.

> The committee's duties, as set forth in the order, are necessary for the discharge of its responsibilities. These duties are generally similar to those specified for administrative agencies under other programs of this character. It is intended that any activities undertaken by the members of the committee will be confined to those which reasonably are necessary for the committee to carry out its responsibilities as prescribed in the program. It should be recognized that these specified duties are not necessarily all inclusive, and that it may develop that there are other duties which the committee may need to perform. (23 Fed. Reg. 3011-12 (1958))

87. On April 5 and 6, 1965, a hearing was held in Fresno, California, pursuant to a notice published in 30 Fed. Reg. 3542 (March 17, 1965). Among the purposes was whether to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A recommended decision was published at 30 Fed. Reg. 13,063 (October 14, 1965) which recommended adding such a provision. As a result thereof the Secretary determined that the proposed amendment would "tend to effectuate the declared policy of the Act." 30 Fed. Reg. 15,990 (December 23, 1965). This was subsequently ratified by referendum whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of Plums and Peaches produced in the production area, indicated that they favored the adoption of the aforesaid amendment to the Order. 30 Fed. Reg. 15,990, 15,991 (December 23, 1965). Thus, section 917.39 (7 C.F.R. § 917.39) was adopted which stated:

> The committees, with the approval of the Secretary, may establish or provide for the

> establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37. (30 Fed. Reg. 15,990, 15,995)

Formal rulemaking conducted in 1971, resulted in amending section 917 to include authority for "production research" for Peaches and "production research" and "paid advertising" for Plums. (36 Fed. Reg. 5614 (March 25, 1971)) Formal rulemaking conduced in 1976 resulted in amending section 917.39 to include authority for paid advertising for Peaches. (41 Fed. Reg. 14,375 (April 5, 1976)) Thus, section 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

> The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37. (41 Fed. Reg. 14375, 14382)

88. The Secretary concluded at 41 Fed. Reg. 14,375, 14,376-77 (April 5, 1976) that:

> The record shows ... a wide consensus among the peach ... industr[y] that promotional activities have been beneficial in increasing demand and should be continued

> .... The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the provisions of the Act and the Order .... Spot radio or TV commercials in the principal markets during peak movement periods have proved to be successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot have considerable influence in triggering retail promotions. The previous success of advertising efforts referred to here are in regards to advertising conducted under State Marketing Orders. *See*, 41 Fed Reg. 14,376 (April 5, 1976).

89. Thus, the basic authority of the Secretary to implement the promotional programs, including advertising, were published at 36 Fed. Reg. 14,381 (August 5, 1971) (Plums), 41 Fed. Reg. 14,375 (Peaches) and 31 Fed. Reg. 6371 (May 19, 1966) (Nectarines).

90-93. ...

94. Petitioners, Wileman Bros. & Elliott, Inc., and Kash, Inc. (sometimes referred to as "Wileman/Kash"), are regulated pursuant to the Nectarine, Plum and Peach Marketing Orders (7 C.F.R. § 916.1, *et seq.* (Nectarines), and 917.1, *et seq.* (Plums and Peaches)).

95. The Secretary of Agriculture, pursuant to Title 7 U.S.C. § 610b, is authorized to establish Committees and associations of producers "for the more effective administration of functions vested in [the Secretary] by this chapter" (Committees are "agencies," pursuant to 7 U.S.C. § 608c(7)(C)).

96. Thus, the Secretary's decisions to implement the promotional programs, published at 36 Fed. Reg. 14,381 (August 5, 1971) (Plums), 41 Fed. Reg. 14,375 (Peaches) and 31 Fed. Reg. 6371, 31 Fed. Reg. 8176, 8177 (1966) (Nectarines), were the Secretary's decisions on the record evidence presented at the formal rulemaking hearings cited therein.

97. Wileman/Kash are required to pay assessments pursuant to Marketing Orders 7 C.F.R. §§ 916.1, *et seq.* (Nectarines) and 7 C.F.R. §§ 917.1, *et seq.* (Plums and Peaches). The assessment rates are ... recommended by the Nectarine Administrative Committee for Nectarines and by the Control Committee of the California Tree Fruit Agreement for Plums and Peaches. These Committees are expected to determine the rates by dividing anticipated expenses by estimated shipments of the particular commodity. The Committees are organized on a fiscal year basis which begins on March 1 of each year (7 C.F.R. § 916.7 and § 917.9). The Committees are required to develop, and submit to the Secretary for approval, a budget of their anticipated expenses for each fiscal year (7 C.F.R. § 916.31(c) and § 917.35(f)). Each particular budget is expected to be discussed and established at Committee meetings generally held in May and then forwarded to the Secretary of Agriculture for review and adoption....

....

98. On or about May 5, 1988, the Nectarine Administrative Committee met and recommended an 18-cents per carton assessment against each 25-pound net weight container of Nectarines packed by each handler. The Nectarine Administrative Committee adopted a budget of $3,123,908 for the 1988 season, of which $867,000 was allocated for inspection ($.05 per carton), $89,153 for research projects, approximately $298,869 for salaries, employee benefits, travel, business meals, equipment, supplies, insurance, utilities, postage, paper envelopes,

special enforcement activity, credit insurance, etc. Other expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately $67,000. However, more than half of the Nectarine budget was to be directed to market development.

99. The Nectarine Administrative Committee approved a 1988 Nectarine Market Development Budget of $1,801,886, which included: $858,146 for television advertising; $306,390 for radio advertising; $114,750 for retail advertising incentives, plus another $112,000 for field staff activities relating to the same; $80,000 for Canadian advertising; $27,200 for trade communications; $22,500 for retail projects; $35,600 for point of sale materials; $59,100 for publicity, education activities; $32,500 for food service activities; $22,500 for promotion expense; $6,950 for Hispanic promotion; and $13,250 for advertising research. This combined total amounted to approximately $.10 per 25-pound net weight container towards the "generic" advertising budget.

100. On or about May 4, 1988, the Plum Commodity Committee met and recommended a 19-cents per container assessment against each 28-pound net weight carton of Plums packed by each handler. The Control Committee adopted a budget for the Plum Commodity Committee of $3,510,878 for the 1988 season, of which $1,085,960 was allocated for inspection ($.06 per carton), $80,052 for research projects, approximately $373,407 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, paper, envelopes, special enforcement activity, credit insurance, etc. The other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately $87,350. However, more than half of the Plum budget was to be directed to market development.

101. The Plum Committee approved the Plum Market Development Budget of $1,971,459, which included:

$850,719 to television advertising; $306,390 for radio advertising; $189,750 for retail advertising incentives; $112,000 for field staff activities relating to the same; $27,200 for trade communications; $22,500 for retail projects; $35,600 for point of sale materials; $59,100 publicity, education activities; $32,500 for food service activities; $22,500 for promotion expense; and $6,950 for Hispanic promotion. This combined total amounted to approximately $.10 per 28-pound net weight container towards the "generic" advertising budget.

102. On or about May 4, 1988, the Peach Commodity Committee met and recommended an 18-cents per carton assessment against each container of Peaches packed by each handler. The Control Committee adopted a budget for the Peach Commodity Committee of $2,562,089 for the 1988 season, only $896,000 of which was for inspection ($.06 per carton), $55,402 for research projects, and approximately $330,352 for salaries, employee benefits, travel, auto operation, equipment supplies, insurance, utilities, postage, papers, envelopes, special enforcement activity, credit insurance, etc. Other Committee expenses included rent for their offices, telephones and other miscellaneous audit expenses amounting to approximately $52,350. However, more than half of the Peach budget was to be directed to market development.

103. The Peach Commodity Committee approved the Peach Market Development Budget of $1,280,435, which included: $456,135 to television advertising; $220,000 for radio advertising; $98,000 for retail advertising incentives; $96,000 for field staff activities relating to the same; $80,000 for Canadian advertising; $27,200 for trade communications; $22,500 for retail projects; $25,300 for point of sale materials; $59,100 for publicity, education activities; $32,500 for food service activities; $22,500 for promotional expense; $6,950 for Hispanic promotion; and $13,250 for advertising research. This combined total

amounted to approximately $.09 per container towards the "generic" advertising budget.

104. The term "Market Development," as used by the Committees, includes field staff activities, retail advertising incentives, trade communications, retail projects, point of sale materials, publicity, education activities, food service activities, TV and radio production, television and radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion and miscellaneous related expenses.

105. ....

106. Subsequent to the filing of a Petition in a prior 7 U.S.C. § 608c(15)(A) proceeding (AMA Docket Nos. 916-1, 916-2, 917-2, 917-3 [(*Wileman I*)]), the Secretary of Agriculture, on April 8, 1988, issued ... a proposed rule.... This proposed rule [related] to Plums ... (53 Fed. Reg. 11,669).... This proposed rule provided that interested persons could file comments through *April 25, 1988.* Subsequently, the time period for filing written comments on the proposed rule was extended to May 2, 1988 (53 Fed. Reg. 13,413; Petitioners' "A.B." No. 3).

107. On April 18, 1988, the Secretary issued proposed rules (virtually identical to those above-mentioned relating to Plums) with respect to ... Nectarines and Peaches ... (53 Fed. Reg. 12,687 (Nectarines); 53 Fed. Reg. 12,691 (Peaches).... The proposed rule provided that interested persons could file comments through May 3, 1988. In his proposed rule for Nectarines, the Secretary [stated]:

> A comment period of less than 30 days is deemed appropriate for this proposal. The harvest and shipment of the 1988 nectarine crop is expected to *start April 25, 1988,* and growers and handlers should be given as much notice as possible of any changes, if adopted to permit the industry to plan

> accordingly. Moreover, the Department already has received letters in opposition to the proposed nectarine size changes indicating the industry is aware of the Committee's recommendation. (53 Fed. Reg. 12690).[4]

108. On May 27, 1988, the Secretary issued Interim Final Rules ... (53 Fed. Reg. 19.218 (Plums); 53 Fed. Reg. 19,226 (Nectarines); 53 Fed. Reg. 19,234 (Peaches)....

109. Wileman/Kash, through their attorney, submitted comments in opposition to the proposed rule modifications regarding Plums, Nectarines and Peaches. Subsequent to the issuance of the Interim Final Rules, Wileman/Kash, through their attorney, submitted comments in opposition to the Interim Final Rules as published.

110. Consequently, on or about June 3, 1988, Wileman/Kash filed the present 7 U.S.C. § 608c(15)(A) Petition to modify, terminate or to be granted an exemption from various provisions of the Nectarine, Plum and Peach Marketing Orders an any obligations imposed in connection therewith that are not in accordance with law.

111. In conjunction with the filing of the 7 U.S.C. § 608c(15)(A) Petition, Wileman/Kash filed an Application for Interim Relief, pursuant to the Rules of Practice Governing Administrative Petition Proceedings, Title 7 C.F.R. § 900.70.

...The Judicial Officer, on July 8, 1988, signed an order denying Wileman/Kash's Application for Interim Relief. Wileman/Kash, on or about July 29, 1988, filed a Motion for Reconsideration of the Order Denying Interim Relief, which Motion was denied on August 3, 1988.

112. On June 16, 1988, for the first time this decade, the Secretary issued a proposed rule regarding the estimated assessment rates. This rule was published in the Federal

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[4]The explanation given by the Secretary ... read identically, with respect to Plums and Peaches, as the above-cited statement regarding Nectarines.

Register (53 Fed. Reg. 23,243) on June 21, 1988 (Petitioners' "A.B." No. 9). The proposed rule provided that interested persons could file comments through July 1, 1988. On July 19, 1988, the Secretary issued a final rule with respect to the assessment rates (53 Fed. Reg. 27,151; Petitioners' "A.B." No. 10). In his final rules the Secretary [stated]:

> The budgets are formulated and discussed in public meetings. Thus all directly affected persons have an opportunity to participate and provide input....
>
> Approval of the expenses, assessment rates, and operating reserves should be expedited because the committees need to have sufficient funds to pay their expenses which are incurred on a continuous basis. In addition, handlers are aware of this action which was recommended by the committees at public meetings. Therefore, the Secretary also finds that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register. (53 Fed. Reg. 27,152).

The Secretary further stated:

> While this section will impose some additional costs on handlers, the costs are in the form of uniform assessments on all handlers. Some of the additional costs may be passed on to producers. However, these costs will be significantly offset by the benefits derived from the operation of the marketing orders. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial

number of small entities. (53 Fed. Reg. 23,244, 27,152).

113-122. ...

123. The Tree Fruit Reserve was incorporated in 1957, as a non-profit California corporation, which obtained tax exempt status from the Internal Revenue Service as a 501(c)(6) organization....

124-179. ...

Conclusions

I. Burden of Proof and Scope of Review.[5]

The fact that petitioners have the burden of proof in this proceeding, and that this is not a proceeding to "second guess" the Secretary's policy judgments, is set forth in many decisions, *e.g., In re Michaels Dairies, Inc.*, 33 Agric. Dec. 1633, 1701-02 (1974), *aff'd*, No. 22-75 (D.D.C. Aug. 21, 1975), *printed in* 34 Agric. Dec. 1319 (1975) *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. Dec. 17, 1976), which states:

> It is well settled that the burden of proof in an 8c(15)(A) review proceeding rests with the petitioner. Petitioner in this proceeding has the burden of proving that the challenged Order provisions and obligations imposed upon it were "not in accordance with law" (7 U.S.C. 608c(15)(A)). See *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 316-317 (C.A. 3), certiorari denied, 394 U.S.

[5]This section is identical to § I in *Wileman I*.

929; *Boonville Farms Cooperative, Inc. v. Freeman*, 358 F.2d 681, 682 (C.A. 2); *United States v. Mills*, 315 F.2d 828, 836, 838 (C.A. 4), certiorari denied, 374 U.S. 832, 375 U.S. 819; *Windham Creamery, Inc. v. Freeman*, 230 F. Supp., 632, 635-636 (D.N.J.), affirmed, 350 F.2d 978 (C.A. 3), certiorari denied, 382 U.S. 979; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 157 F.2d 87 (C.A. 8), certiorari denied, 329 U.S. 788; *Wawa Dairy Farms v. Wickard*, 56 F. Supp. 67, 70 (E.D. Pa.), affirmed, 149 F.2d 860, 862-863 (C.A. 3); *In re Clyde Lisonbee*, 31 Agriculture Decisions 952, 961 (1972); *In re Fitchett Brothers, Inc.*, 31 Agriculture Decisions 1552, 1571 (1972).

The inquiry here does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations issued pursuant to the Act. See *In re Independent Milk Producer-Distributors' Assoc.*, 20 Agriculture Decisions 1, 18 (1961); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 Agriculture Decisions 1209, 1220 (1957), affirmed, Southern Dist. Miss., January 5, 1959. See, also, *Pacific States Co. v. White*, 296 U.S. 176, 182.

The responsibility for selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters of administrative competence. *American Power Co. v. S.E.C.*, 329 U.S. 90, 112; *Secretary of Agriculture v. Central Roig Co.*, 338 U.S. 604, 610-614.

Without a showing that the action of the Secretary was arbitrary, his action is presumed to be valid. *Benson v. Schofield,* 236 F.2d 719, 722 (C.A.D.C.), certiorari denied, 352 U.S. 976; *Reed v. Franke,* 297 F.2d 17, 25-26 (C.A. 4). Mere assertions of illegality are not sufficient to have an order provision or administrative decision declared illegal. *In re College Club Dairy, Inc.,* 15 Agriculture Decisions 367, 373 (1956).

There is a presumption of regularity with respect to the official acts of public officers and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Foundation,* 272 U.S. 1, 14-15. Accord: [*Panno v. United States,* 203 F.2d 504, 509 (9th Cir. 1953);] *Reines v. Woods,* 192 F.2d 83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.,* 188 F.2d 825, 827 (C.A. 5); *Woods v. Tate,* 171 F.2d 511, 513 (C.A. 5); *Pasadena Research Laboratories v. United States,* 169 F.2d 375, 381 (C.A. 9), certiorari denied, 335 U.S. 853; *Laughlin v. Cummings,* 105 F.2d 71, 73 (C.A.D.C.). Specifically, administrative orders and regulations are presumed to be based on facts justifying the specific exercise of the delegated authority. *United States v. Rock Royal Co-op.,* 307 U.S. 533, 567-568 (a case under the Act involved herein); *Thompson v. Consolidated Gas Co.,* 300 U.S. 55, 69: *Pacific States Co. v. White,* 296 U.S. 176, 185-186.

The scope of review is set forth in § 10(e) of the Administrative Procedure Act as follows (5 U.S.C. § 706):

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

....

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute.

The "narrow" scope of review under the arbitrary and capricious standard (just quoted (5 U.S.C. § 706(2)(A)) is set forth in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971), as follows:

> Section 706(2)(A) requires a finding that the actual choice made was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment .... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

The Court further stated in *Bowman Transp., Inc. v. Ark.-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974):

> But we can discern in the Commission's opinion a rational basis for its treatment of the evidence, and the "arbitrary and capricious" test does not require more.

The "narrow" scope of review under § 706(2)(A), i.e., "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and the fact that it "forbids the court's substituting its judgment for that of the agency," is explained in *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir. 1975) (en banc) (footnotes omitted), *cert. denied*, 426 U.S. 941 (1976), as follows:

> This standard of review is a highly deferential one. It presumes agency action to be valid.... Moreover, it forbids the court's substituting its judgment for that of the agency, ... and requires affirmance if a rational basis exists for the agency's decision.[73] ...

This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual. Rather, the reviewing court must assure itself that the agency decision was "based on a consideration of the relevant factors ***."[74] Moreover, it must engage in a "substantial inquiry" into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park v. Volpe, supra*, 401 U.S. at 415, 416, 91 S.Ct. at 823, 824, 28 L.Ed.2d at 152, 153. This is particularly true in highly technical cases such as this one.

> A court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent.

Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 392, 444 F.2d 841, 850 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 2233, 29 L.Ed.2d 701 (1971)....

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve

itself in even the most complex evidentiary matters; rather, the two indicia of arbitrary and capricious review stand in careful balance. The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more intensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly preform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.... The immersion in the evidence is designed *soley* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors..... It is settled that we must affirm decisions with which we disagree so long as this test is met.[76] ...

Thus, after our careful study of the record, we must take a step back from the agency decision. We must look at the decision not

> as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.[77] "Although [our] inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 416, 91 S.Ct. at 824, 28 L.Ed.2d at 153. We must affirm unless the agency decision is arbitary or capricious.[78]

The "narrow" scope of review under the "arbitrary and capricious" standard, under which "a court is not to substitute its judgment for that of the agency," with examples of when a court should reverse an agency, is set forth in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983), as follows:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* at 285; *Citizens to Preserve*

> *Overton Park v. Volpe, supra,* at 416. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

In *In re Schepp's Dairy, Inc.,* 35 Agric. Dec. 1477 (1976), *aff'd,* No. 76-1984 (D.D.C. Aug. 15, 1977), *aff'd sub nom. Schepps Dairy, Inc. v. Bergland,* 628 F.2d 11 (D.C. Cir. 1979), it is explained that it is for the Secretary in his rulemaking capacity to make policy judgments based upon conflicting testimony and conflicting considerations, and that even though other regulatory alternatives might have been more persuasively reasonable, that is not enough to set aside, as illegal, the regulatory alternative selected by the Secretary. Specifically, it is stated (35 Agric. Dec. at 1493, 1495, 1497-98):

> Section 8c(4) requires not only that order provisions be based upon record evidence, but that they also tend to effectuate the declared policy of the Act. Petitioner's argument ignores the discretionary power conferred upon the Secretary with respect to such finding. As noted earlier, there was extensive testimony at the hearing relating to various approaches and considerations to be taken in determining the appropriate location adjustment. The fact that the Secretary chose one regulatory alternative over another cannot logically give rise to cries of illegality.

> *Lewes Dairy, supra* [401 F.2d 308 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969)], at page 319.
>
> ....
>
> While the Secretary's finding as to the effectuation of the policy of the Act must be based on the evidence introduced at the hearing, there is no compulsion that the Secretary find that a proposal will tend to effectuate the statutory policy even though supported by evidence.
>
> ....
>
> In order to successfully challenge the decision of the Secretary, petitioner cannot merely show that, on the balance, its position is supported by evidence in the record, or vaguely allege that the Secretary's decision is unsupported in the record. Petitioner has the substantial burden to overcome a strong presumption of the existence of facts which support the administrative determination. *Lewes Dairy, Inc., supra,* pages 315-316. The Act gives the Secretary broad discretionary powers to effectuate its purposes. The existence of regulatory alternatives, even those which might be more persuasively reasonable, is not cognizable on review, *Lewes, supra,* pages 317, 319.

> This proceeding does not afford petitioner a forum to review questions of policy, desirability, or effectiveness of Order provisions, *In re Sunny Hill Farms Dairy Co.*, 26 A.D. 201, 217 [*aff'd*, 446 F.2d 1124 (8th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972)].[6] It is not sufficient for petitioner to show that the record may contain evidence supporting its positions. On the contrary, petitioner must establish clearly that the record cannot sustain the conclusion reached by the Secretary.

II. The Act Limits the Scope of Inquiry in This Proceeding to the Matters Raised in the Petitions Filed by Petitioners, and Does Not Permit an Award of Monetary Damages.[7]

Before considering the substantive issues raised in this proceeding, it is important to recognize two limitations applicable to proceedings under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)). First, the ALJ and the Judicial Officer can only rule on matters raised in the Petitions filed by petitioners. Second, the Act does not permit an award of monetary damages.

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[6] *Sunny Hill* cites (26 Agric. Dec. at 217):

> See, *e.g.*, *United States v. Howeth M. Mills, et al., supra* [,315 F.2d 828, 838 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)]; *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 A.D. 1209, 1220 (1957), *aff'd*, S.D. Miss., Jan. 5, 1959; *In re Clover Leaf Dairy Company*, 15 A.D. 339 (1956), *aff'd*, N.D. Ind., Sept. 10, 1958. *Cf. Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 1982 (1935).

[7] This section is identical to § II in *Wileman I*, except that § II(B) of *Wileman I* (the Act does not permit review of discretionary determinations as to a particular lot of fruit) is omitted, as irrelevant, and the *Farm Fresh* history has been updated.

A. The Act Limits the Scope of Inquiry in a § 8c(15)(A) Proceeding to the Matters Raised in the Petitions Filed by Petitioners.

Section 8c(15)(A) of the Act provides (7 U.S.C. § 608c(15)(A) (emphasis added)):

> **(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary**
>
> (A) *Any handler* subject to an order *may file a written petition* with the Secretary of Agriculture, *stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom.* He shall thereupon be given an opportunity for a hearing *upon such petition*, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling *upon the prayer of such petition* which shall be final, if in accordance with law.

Under the plain terms of the Act, the Secretary's authority is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A)). This principle was recently stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, 79-80 (1990), *aff'd on other grounds*, CIV-90-688 T (W.D. Okla. June 24, 1991), as follows:

> In addition to disagreeing with the ALJ on the merits of the Notice of Hearing issue, I disagree with the ALJ on procedural

grounds. That is, I believe that it was inappropriate for the ALJ to hold that the Notice of Hearing (and therefore the amendatory order) was invalid on the basis of a sentence in the Notice of Hearing not relied upon by the petitioner. It should be noted that this is not the typical proceeding brought before the ALJs whereby the Department is the complainant, and the ALJ might appropriately note *sua sponte* a ground of *defense* not noticed by the respondent's counsel. Rather, a § 8c(15)(A) proceeding is instituted by a private party, who is responsible for framing the issues. Under § 8c(15)(A) of the Act (7 U.S.C. § 608c(15)(A)), only a handler may file "a written petition" challenging an order, or any provision thereof, after which the handler shall be given opportunity for a hearing "upon such petition, in accordance with regulations made by the Secretary," and with a ruling made "upon the prayer of such petition. . . ." Neither the statute nor the Rules of Practice authorize an ALJ or the Judicial Officer to challenge an order or a provision thereof upon a basis not raised by the handler. The Rules of Practice require the petition to specifically state the "grounds" for the challenge (7 C.F.R. § 900.52(b)(4)), limit the evidentiary record to matters relevant and material to those grounds (7 C.F.R. § 900.60(d)), and require the ALJ to base his decision on that record (7 C.F.R. § 900.64(c)).

Even though the petitioner contested the adequacy of the Notice of Hearing in its

petition, petitioner did not rely on the ground relied upon by the ALJ in holding that the Notice of Hearing was inadequate. Accordingly, I believe that it was error for the ALJ to raise *sua sponte* the issue as to whether the sentence limiting the receipt of evidence "to the economic and marketing conditions which relate to the location adjustment provisions of the proposed merged and expanded Southwest Plains marketing area" precluded the receipt of evidence on the issue as to whether Lincoln County should be placed in Zone I.

The Judicial Officer has suggested, by way of dicta, that in a *disciplinary* proceeding instituted by the Department, it might be appropriate to permit an amendment to the complaint at the conclusion of the hearing to conform to the proof. *See In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1896 n.22, 1902-03 (1984). But that practice would not be appropriate in a § 8c(15)(A) proceeding such as this, in view of the express statutory language discussed above, and the industry-wide effect of the decision in a § 8c(15)(A) proceeding.

B. The Act Does Not Authorize the Award of Monetary Damages.

Under the plain terms of the Act, a handler's Petition under § 8c(15)(A) of the Act is limited to "stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law *and praying for a modification thereof or to be exempted therefrom,*" and the Secretary is limited to ruling "upon the prayer of such petition" (7 U.S.C. § 608c(15)(A) (emphasis added)). There is no authorization in the Act, the Marketing Orders, or the Rules of Practice for consequential damages (as distinguished from a return of monies paid) to be awarded in

§ 8c(15)(A) proceedings. In over 50 years of proceedings under this Act, consequential damages have never been awarded. Petitioners and the ALJ attempt to distinguish fruit and vegetable orders from milk orders by contending that the latter orders only involve monies paid, and never consequential injury. This allegation is incorrect. For example, a milk supply plant might well suffer only consequential damages from a pooling provision that required an unlawfully high percentage of its milk to be delivered to distributing plants. Nonetheless, no case has ever been decided under milk orders or fruit and vegetable orders which would allow for consequential damages.

There have, of course, been some milk cases in which, as a result of a determination that an obligation to pay money imposed on a milk handler by a Market Administrator was unlawful, refunds have been made to the handler. *See, e.g., In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 59 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988). But even "where a handler has been awarded money in a § 8c(15)(A) proceeding, interest [i.e., consequential damage] has never been awarded." *Id.* at 60.

Furthermore, even though an obligation unlawfully imposed on a milk handler might permit a return of the money unlawfully exacted from the handler, the general practice in this Department is first to give the Secretary the opportunity, in his rulemaking capacity, to correct the error, retroactively. As stated in *In re Farm Fresh, Inc.*, 49 Agric. Dec. 23, 99-101 (1990), *aff'd on other grounds*, CIV-90-688 T (W.D. Okla. June 24, 1991):

> Since I am dismissing the petition, it is unnecessary for me to rule on what relief would have been appropriate if the petition were not dismissed. However, if the petition were not dismissed, I would have remanded the proceeding for the Secretary to determine the appropriate remedy in his legislative capacity, for the reasons set forth in Respondent's Appeal Petition at 36-69, attached as Appendix B, and Respondent's Reply Brief filed Oct. 11, 1988, at 5-7, attached as Appendix C. (These excerpts from respondent's briefs will not be published in Agriculture Decisions, since it is not necessary for me to decide this issue.)

As stated in *In re Baker & Sons, Dairy, Inc.*, 48 Agric. Dec. [818, 865-66 (1989)], *appeal docketed sub nom. Meadow Gold Dairies, Inc. v. Yeutter*, No. 89-543-JJF (D. Del. Oct. 10, 1989):

> VI. *If the Secretary's Temporary Emergency Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*
>
> If the Secretary's temporary, emergency rulemaking action were held to be unlawful, the proper course would be to remand the porceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioners. See *In re Defiance Milk Products Co.*, 44 Agric. Dec. 11, 57-62 (1985), *aff'd on other grounds*, No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd*, 857 F.2d 1065 (6th Cir. 1988);[8] *In re*

[8] In *Defiance*, the Judicial Officer recognized that some courts had awarded monetary relief to some handlers, but the Judicial Officer did not adopt that policy as the proper Departmental policy.

Borden, Inc., 37 Agric. Dec. 987, 997-1000 (1978), *remanded,* 38 Agric. Dec. 1061 (1979),[9] *dismissed per settlement agreement,* 40 Agric. Dec. 1711 (1979); *In re Babcock Dairy Co. of Ohio,* 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland,* 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

In some cases, courts have remanded proceedings for further administrative consideration. See, *e.g., Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland, supra; Rodway v. USDA,* 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

[9]In *In re Borden, Inc.,* 38 Agric. Dec. 1061 (1979) (remand order), the Judicial Officer remanded the proceeding to the ALJ to determine the damages [i.e., the return of money paid by the handler]. But that remand order does not reflect the Department's customary practice, since the remand order related to two related proceedings, one of which was controlled by a court decision holding that Borden was entitled to recover overpayments from the producer-settlement fund. *Borden, Inc. v. Butz,* 544 F.2d 312, 319-20 (7th Cir. 1976).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See *e.g., Blair v. Freeman,* 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also *Lehigh Valley Coop. Farmers, Inc. v. United States,* 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan,* 307 U.S. 183, 185-98 (1939).

In *In re Defiance Milk Products Co.,* 44 Agric. Dec. 11, 57-59 (1985), *aff'd on other grounds,* No. 85-7179 (N.D. Ohio Dec. 12, 1986), *aff'd,* 857 F.2d 1065 (6th Cir. 1988), *reprinted in* 47 Agric. Dec. 1377 (1988), referred to in the preceding quotation, it is stated:

> III. *If the Secretary's Temporary Rulemaking Action Were Found Unlawful, the Proper Course Would Be to Remand the Matter to the Secretary for Lawful Action.*

After concluding that it was unlawful for the Secretary to refuse to adopt petitioner's proposal, the ALJ ruled (Initial Decision at 28):

> The result of the Secretary's action was that petitioner was required to pay 40 cents per hundredweight more for producer milk than its competitors marketing other Class III

products. The proper remedy in such circumstances is for the Market Administrator of Order 33 to reimburse petitioner the amount of this overcharge.

In the first place, petitioner was not required to pay more for milk than its competitors making evaporated milk or any of the other 14 products remaining in Class III. Only handlers making butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) benefited from the temporary price reduction. All handlers of the 15 products remaining in Class III, including other handlers making evaporated milk, continued to pay the same basic formula price previously set by a valid rulemaking proceeding.

But even if the Secretary's rulemaking action were held to be unlawful, the proper course would be to remand the proceeding to the Secretary to determine in his legislative capacity the appropriate action to be taken, which might or might not result in any payment to petitioner.

If, for example, the Secretary's temporary rulemaking action were held unlawful because the Secretary failed to explain in his rulemaking decision that he was actually reclassifying milk used to produce butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in a new Class III(A), priced 40¢ less than the basic formula price applicable to Class III, the

obvious remedy would be for the Secretary to amend his findings and conclusions, which would eliminate the illegality.

If, on the other hand, it were held (i) that substantial evidence does not support putting butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A), or (ii) that it is unlawful to include butter, nonfat dry milk and cheese (except cottage cheese and cottage cheese curd) in the temporary, new Class III(A) without also including evaporated milk, the Secretary might (a) want to hold a new hearing to determine *nunc pro tunc* what temporary action should have been taken (which could take anyone of numerous forms), (b) acquiesce in the determination of illegality and annul the temporary rulemaking action as to all handlers, or (c) include evaporated milk (and perhaps other products) in the temporary, new Class III(A). There would be no basis for binding the Secretary to take only one action, *viz.*, include evaporated milk, but none of the other 14 products that would remain in Class III, in the new Class III(A).

Where it has been administratively determined that the Secretary's rulemaking action is unlawful, it has been the practice in this Department for more than 40 years to remand the proceeding to the Secretary, rather than for the ALJs or the Judicial Officer to take corrective rulemaking action. See, *e.g.*, *In re Borden, Inc.*, 37 Agric. Dec. 987, 997-1000 (1978), *remanded*, 38 Agric. Dec. 1061 (1979), *dismissed per settlement*

agreement, 40 Agric. Dec. 1711 (1979); *In re The Babcock Dairy Co. of Ohio,* 35 Agric. Dec. 431, 444-46 (1976), *remanded sub nom. American Dairy of Evansville, Inc. v. Bergland,* 627 F.2d 1252, 1261-62 (D.C. Cir. 1980) (remanding case to the Secretary to issue new provisions supportable on the record or to hold a new hearing on the issue, at the Secretary's discretion, while granting petitioner prospective relief in the interim).

Even during the period prior to 1980, when the delegation of authority to the Judicial Officer included authority to perform "any regulatory function" (7 C.F.R. § 2.35 (1979)), which is not now in the Judicial Officer's delegation of authority (7 C.F.R. § 2.35 (1984)), in actual practice, the Judicial Officer always refrained from exercising any rulemaking function. *Flavin,* "The Functions of the Judicial Officer, USDA," in 26 Geo. Wash. L. Rev. 277, 278 n. 9 (1958) (written by the Department's Judicial Officer from 1942 to 1972).

In similar situations, courts also frequently remand proceedings for further administrative consideration. See, *e.g., Addison v. Holly Hill Fruit Prods., Inc.,* 322 U.S. 607, 619-23 (1944) (remand is the proper course where part of a rule is deemed invalid, so that the Administrator can retrospectively act as he would have done if he had limited himself to statutory authority); *American Dairy of Evansville, Inc. v. Bergland, supra; Rodway v. USDA,* 514 F.2d 809, 817-18 (D.C. Cir. 1975) (rule invalidated and proceeding remanded to the Secretary for a

new rulemaking proceeding in compliance with the APA, with invalidated regulation to remain in effect in interim).

In other cases, courts have refused to give refunds to prevailing parties, notwithstanding the illegality of administrative action. See, *e.g., Blair v. Freeman,* 370 F.2d 229, 239-40 (D.C. Cir. 1968) (where "nearby differential" was held invalid, equitable considerations precluded refund to prevailing parties). See, also, *Lehigh Valley Coop. Farmers, Inc. v. United States,* 370 U.S. 76, 99 (1962) (where regulation held invalid, Court left open question as to whether Secretary could retrospectively apply new regulation to impounded funds); *accord United States v. Morgan,* 307 U.S. 182, 185-98 (1939).

Courts have, however, awarded relief to prevailing parties in some cases distinguishable from the present case. In *Fairmont Foods Co. v. Hardin,* 442 F.2d 762 (D.C. Cir. 1971), a handler challenged the 1965 promulgation of a higher Class I price applicable to its plant location and requested a refund of the difference between the pre-1965 price and the higher price it had been forced to pay between 1965 and 1968 as a result of the amendment. *Id.* at 766 n. 16. The court set aside the amendment because the rulemaking record did not contain substantial evidence to support it. *Id.* at 767. The court concluded that the plaintiff was entitled to recover the "overpayments which it made pursuant to this invalid Order." *Id.* at 773.

In *Fairmont Foods,* the court held that the handler should only have paid the price set

by the valid Order provision which preceded the invalid amendment, and that the "overpayments" should be returned to the handler. In the present case, however, the price petitioner paid for milk in June and July 1983 was the same price it had been paying which had been set by a valid Order provision not even challenged in this proceeding. There is no prior, valid price to revert to, as in *Fairmont Foods,* because the prior, valid price is the one which petitioner paid in this case.

Similarly, in *Borden, Inc. v. Butz,* 544 F.2d 312, 319-20 (7th Cir. 1976), and *Abbotts Dairies Division of Fairmont Foods, Inc. v. Butz,* 584 F.2d 12, 16-21 (3d Cir. 1978), handlers challenged order amendments which raised the Class I price for their milk above the level at which it had been previously set. The courts found insufficient evidence for the amendments, and, therefore, held that they were invalid. The handlers' recoveries were based on the fact that they had paid a price set by invalid Order provisions. But, as stated above, here petitioner's price for milk was set by a prior, valid Order provision. Accordingly, those cases are not analogous to the situation here.

In the present case, if the Secretary's temporary, rulemaking action were held unlawful, I would adhere to the Department's settled practice for over 40 years, and remand the proceeding to the Secretary for further legislative consideration. That action is particularly appropriate here in view of the numerous, reasonable options available

> to the Secretary, if his original, temporary action were held invalid.

Similarly, in *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 191 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990), it is stated:

> Finally, even if petitioners had properly made a case as to the omission of alternative views (which they did not), and I believed such an omission to be legal error (which I do not), rather than hold invalid those weekly volume regulations where petitioners proved their case, in this respect, I would have remanded the matter to the Division Director to make a determination at the present time as to whether the additional information would have altered the regulation for the week in question. *See Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 619-23 (1944); *In re Oak Tree Farm Dairy, Inc.,* 38 Agric. Dec. 113, 165-66 (1979) (decision on remand), *aff'd,* 544 F. Supp. 1351 (E.D.N.Y. 1982).

However, irrespective of whether the Secretary should be permitted to correct an error retroactively, where error has been found in a § 8c(15)(A) proceeding, an award of monetary damages (as distinguished from a return of money already paid) is not permitted by the Act.

III. The Lawfulness of an Order or Provision Thereof or Regulation Issued Thereunder Must Be Determined Only Upon the Basis of the Evidence Before the Secretary in the Formal or Informal Rulemaking Records, and Not by Evidence Received at a § 8c(15)(A) Proceeding.

It is well settled that the lawfulness of Marketing Order or a provision thereof or a regulation issued thereunder must be judged by the facts contained in the formal or informal hearing record, rather than by facts petitioners would seek to introduce at a § 8c(15)(A) hearing. *See Dairymen's League Coop.Ass'n v. Brannan,* 173 F.2d 57, 66 (2d Cir.), *cert. denied,* 338 U.S. 825 (1949); *Beatrice Creamery Co. v. Anderson,* 75 F. Supp. 363, 367 (D. Kan. 1947); *Bailey Farm Dairy Co. v. Jones,* 61 F. Supp. 209, 228 (E.D. Mo. 1945),, *aff'd,* 157 F.2d 87 (8th Cir.), *cert. denied,* 329 U.S. 788 (1946); *In re Sequoia Orange Co.,* 41 Agric. Dec. 1511, 1521-23 (1982), *order transferring case,* No. 82-2510 (D.D.C. June 14. 1983), *aff'd on other grounds,* No. CV F 83-269 (E.D. Cal. Dec. 21, 1983), As stated in *In re Leonberg,* 32 Agric. Dec. 763, 792 (1973):

> It is well established that when the lawfulness of the Order itself or a provision thereof is attacked, the Act affords no trial *de novo* by way of the 8c(15)(A) petition. *The Order must stand or fall upon the basis* of the *evidence before the Secretary adduced during the promulgation proceedings,* and additional evidence is not relevant or admissible in the 8c(15)(A) proceeding. "To allow evidence [in the 8c(15)(A) proceeding not presented in the promulgation proceeding] would be to reopen, rather than to judge, the promulgation proceeding." *United*

> *States v. Mills,* 315 F.2d 829, 836 (C.A. 4), certiorari denied, 374 U.S. 832. Accord: *Dairymen's League Cooperative Ass'n v. Brannan,* 173 F.2d 57, 66 (C.A. 2), certiorari denied, 338 U.S. 825; *In re Terrace Park Dairy,* 12 Agriculture Decisions 1383, 1396-1397 (1953); *Sprague Dairy Co. v. Anderson,* 6 Agriculture Decisions 729 (N.D. Ill.). See, also, *Acme Fast Freight, Inc. v. United States,* 154 F. Supp. 239, 241 (S.D.N.Y.).[8]

This exclusionary rule is necessary to maintain the integrity of the regulatory program. The promulgation of an Order or an amendment thereto is formal rulemaking subject to section 7 of the Administrative Procedure Act (5 U.S.C. § 556), which provides that no rule shall be issued except as "*supported by and in accordance with the reliable, probative, and substantial evidence.*" Section 8c(4) of the Agricultural Marketing Agreement Act (7 U.S.C. 608c(4)) requires that in issuing an Order the Secretary shall find upon the evidence introduced at the promulgation hearing that issuance of the Order will tend to effectuate the declared policy of the Act. The administrative process would be seriously disrupted if the Secretary based his determination to issue an Order upon the evidence

[8] *Lewes Dairy, Inc. v. Freeman,* 401 F.2d 308, 315-19 (1968), *cert. denied,* 394 U.S. 929 (1969), is not to the contrary. In that case, the relevant "record" was the record of the evidence adduced at the § 8c(15)(A) proceeding, rather than the evidence adduced at the formal rulemaking hearing, but that was because the issue was whether the challenged Order provisions, as applied to the particular handler challenging the Order, created an illegal trade barrier, which is expressly prohibited by the Act (401 F.2d at 310-20).

> before him, while the validity of his determination was later judged upon different evidence. Therefore, any new, relevant evidence bearing upon the validity of the Order must be presented first to the Secretary in his legislative, and not in his judicial capacity.

Petitioners must confine their challenges to the rulemaking record before the Secretary at the time of the rulemaking, "not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1972). "With respect to factual contentions, the (15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record—which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum." *In re Sequoia Orange Co.*, 47 Agric. Dec. 2, 99 (1988), *aff'd in part and remanded sub nom. Riverbend Farms, Inc. v. Yeutter*, No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed*, No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990). Furthermore, it must be presumed (until proven contrary) that substantial evidence in the promulgation hearing record supports all of the provisions of an Order. *See United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 184-85 (1935); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934). If that evidence is faulty, or if circumstances have changed so that the Order no longer produces equitable results, the remedy is through the amendatory or termination process—not through a § 8c(15)(A) proceeding.

In the present case, petitioners did not introduce into evidence the formal rulemaking records supporting the Order provisions at issue here. Nonetheless, they challenged the Order provisions on the basis of evidence

erroneously received at the § 8c(15)(A) hearing. That cannot lawfully be done. Similarly, although the informal rulemaking records underlying particular regulations were properly received in evidence, petitioners challenged the regulations on the basis of additional evidence improperly received at the § 8c(15)(A) hearing. That, too, was improper. As shown below, the ALJ's reliance on such § 8c(15)(A) "evidence" was error.

IV. *Res Judicata* (Claim Preclusion and Issue Preclusion) Requires Dismissal of Some of Petitioners' Claims.

A. Petitioners' Allegations Regarding Assessment Regulations and Their Attendant Budget Approvals for Marketing Orders 916 and 917 for 1984-1987 Must Be Dismissed Under the Doctrine of *Res Judicata* (Claim Preclusion).

The Decision in *Wileman I* specifically rejected petitioners' claims that the assessment regulations for 1984-1987 under Marketing Orders 916 and 917, and their attendant budget approvals, were not in accordance with law (*Wileman I*, 49 Agric. Dec. at 783-96, slip op. at 76-88). The Decision in *Wileman I* states that the petitioners prayed for a return of assessments only for the years 1984 through 1987, and, therefore, that no other years were relevant (49 Agric. Dec. at 783 n.13, slip op. at 76 n.13). In the present proceeding, petitioners seek to relitigate the legality of the assessment regulations and their attendant budget approvals for 1980-1987 (Amended Petition, ¶¶ 11, 13, 14, 17, 18, 19, 31, 32, 33, possibly 34-38, 53, 54, 62(M), 62(N) and 62(O)).[9] Such relitigation as to 1984-1987 is barred by the doctrine of *res judicata* (claim preclusion).

[9]Some of these paragraphs also involve allegations as to 1988 and subsequent years, and some involve allegations barred by the doctrine of claim preclusion (see § IV(B), *infra*).

In recent years, the courts have increasingly used the term *res judicata* to encompass two separate legal doctrines, each of which is applicable to some of petitioners' allegations. In *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535-36 (5th Cir. 1978), the court explained these legal principles as follows:

> The rules of *res judicata,* as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is "claim preclusion," or true *res judicata.* It treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." *Sea Land Services, Inc. v. Gaudet,* 1974, 414 U.S. 573, 578-79, 94 S.Ct. 806, 39 L.Ed.2d 9, 17-18. *See also* discussion in Restatement Second of Judgments, p. 1 and § 47 (Tent. Draft No. 1, 1973). When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar." *Angel v. Bullington,* 1947, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832. *Cf. Cleckner v. Republic Van and Storage Co.*, 5 Cir. 1977, 556 F.2d 766. *See also* discussion in Restatement Second of Judgments, p. 1 and § 48 (Tent. Draft No. 1, 1973). Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all

> issues relevant to the same claim between the same parties, whether or not raised at trial. *Garner v. Giarrusso,* 5 Cir. 1978, 571 F.2d 1330 (1978); *International Assoc. of Machinists & Aerospace Workers, v. Nix,* 5 Cir. 1975, 512 F.2d 125, 131; *Blanchard v. St. Paul Fire and Marine Ins. Co.,* 5 Cir. 1965, 341 F.2d 351, 359. *See also* Restatement Second of Judgments, §§ 47(b) and 48 comment a (Tent. Draft No. 1, 1973). The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach.
>
> The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. [Footnote omitted.] In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. *Harris v. Washington,* 1971, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212. *See also* Restatement of Judgments, § 68 and Restatement Second of Judgments, § 45(c) (Tent. Draft No. 1, 1973). It is insufficient for the invocation of issue preclusion that some question of fact or law in a later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered. [Footnote omitted.]

With regard to the question of relitigation the legality of the 1984-1987 assessment regulations and their attendant budget approvals, the relevant doctrine is claim preclusion (a/k/a merger and bar; true *res judicata*). Under the doctrine of claim preclusion, the Supreme Court has consistently held that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action." *Allen v. McCurry,* 449 U.S. 90, 94 (1980) (emphasis added). *See also Cromwell v. County of Sac.,* 94 U.S. 351, 352 (1876). This doctrine is applicable where the issues in the two legal actions involve the same "transaction" or "series of transactions" (*Restatement (Second) of Judgments* § 24), or the same factual "occurrence" (*National Benefit Fund for Hosp. and Health Car Employees v. Presbyterian Hosp.,* 448 F. Supp. 136, 138 (S.D.N.Y. 1978)), or the "same disputed facts" (*Lambert v. Conrad,* 536 F.2d 1183, 1186 (7th Cir. 1976)), or where "the facts underlying . . . [the] claims are identical" (*In re A. Musto Co. v. Satran,* 477 F. Supp. 1172, 1176 (D. Mass. 1979)). The doctrine of claim preclusion is not obviated merely because, in the second legal action, the plaintiff seeks to assert a different legal theory (*Expert Electric, Inc. v. Levine,* 554 F.2d 1227, 1234 (2d Cir. 1977), *cert. denied,* 434 U.S. 903 (1977)), or seeks a new remedy (*Restatement (Second) of Judgments* § 25). Thus, the fact that there is a final[10] decision on the merits[11] regarding the same factual situation requires that the *res judicata* (claim preclusion) doctrine be applied, and

[10] A decision is considered final for *res judicata* purposes even though an appeal is pending in a higher court. *Sherman v. Jacobson,* 247 F. Supp. 261, 268 (S.D.N.Y. 1965).

[11] For *res judicata* purposes, even a previous holding that a court lacks subject matter jurisdiction is considered as a decision on the merits, since this is not a curable defect. *Stewart Securities Corp. v. Guaranty Trust Co.,* 597 F.2d 240, 240-43 (10th Cir. 1979).

that a party be prohibited from relitigating that situation on any legal theory in a new proceeding.

These same petitioners litigated the same basic factual situation (i.e., the 1984-1987 assessment regulations and their attendant budget approvals under Marketing Orders 916 and 917) on the basis of several different legal theories in *Wileman I.* The Decision in *Wileman I* decided that claim on the merits. It now matters not that *Wilman I* is on appeal, or even which party prevailed on that claim (since either merger or bar would occur), or that petitioners have added some new legal theories in the current petition. The only salient point is that there is a final judgment at the Department level regarding those years. Thus, those years cannot be relitigated in the instant proceeding. Furthermore, although petitioners' claims in *Wileman I* as to the 1984-1987 assessment regulations and budget approvals under Marketing Orders 916 and 917 included only nectarines and plums, petitioners are not allowed to split their cause of action under Marketing Order 917 for 1984-1987 to now attack the assessments and budget approvals for peaches for 1984-1987. *See Restatement (Second) of Judgments* §§ 24-26.

B. Various Other Allegations of the Amended Petition Must Be Dismissed Under the Doctrine of *Res Judicata* (Issue Preclusion).

The second *res judicata* doctrine (a/k/a issue preclusion; collateral estoppel) prohibits the petitioners herein from relitigating certain legal issues with regard to the maturity regulations, and the assessment regulations and their attendant budget approvals, in that said legal issues were fully litigated in *Wileman I.* As noted above, the parties in *Wileman I* are identical to the parties here, and it is irrelevant for *res judicata* purposes that the Decision and Order in *Wileman I* is on appeal.

The only pertinent point is that the legal theory in the current proceeding is the same, and there has been no change in the factual circumstances which would impact on the legal theory.[12] Hence, a variety of claims, which have already been litigated, cannot herein be relitigated for 1980-1983, and 1988 and future years, since there have been no factual changes material to these claims. *See Thistlethwaite v. City of New York,* 497 F.2d 339, 340-43 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974).

As stated in § IV(A), *supra, res judicata* (claim preclusion) applies to the issues involving assessment regulations and the attendant budget approvals for 1984 through 1987. In addition, *res judicata* (issue preclusion) applies with respect to the other years, 1980 through 1983, and 1988 and later years, with respect to the issue as to whether the Secretary's approval of the Committees' budget are subject to the rulemaking requirements of the APA. See *Wileman I* (49 Agric. Dec. at 783-96, slip op. at 76-88), discussed in § XI(C)(2), *infra.*

However, other assessments issues, which respondent contends are subject to *res judicata* (claim preclusion), were not decided in *Wileman I* and, therefore, claim preclusion is inapplicable. Specifically, Respondent's Appeal Petition renews the arguments made in respondent's Motion to Dismiss filed October 4, 1989 (Respondent's Appeal Petition at 3). In respondent's Motion to Dismiss filed October 4, 1989, at 8, respondent argues that claim preclusion applies to petitioners' constitutional arguments relating to assessments, *viz,* that the assessments violate petitioners' rights under the First Amendment and the equal protection guarantees provided by the Fifth Amendment, and that the assessments constitute an unconstitutional tax without proper delegation. It was held in

[12] A change in the factual circumstances refers to an actual change in the factual circumstances which has occurred *since* the earlier proceeding, not merely to new evidence in the second proceeding as to the identical factual situation that was involved in the first proceeding.

Wileman I that the constitutional issues raised by petitioners in their briefs had not been raised in their Petitions and, therefore, that the constitutional issues were not properly raised in *Wileman I* (*Wileman I,* 49 Agric. Dec. at 783 n.13 slip op. at 76 n.13). Accordingly, *res judicata* (issue preclusion) is not applicable to these constitutional issues.

Similarly, respondent's argument, that *res judicata* (issue preclusion) applies to petitioners' claim that the assessment regulations cannot be applied to the whole fiscal year because they were retroactively issued (Amended Petition at ¶ 17), is not well taken since "retroactivity [was] not directly raised in *Wileman I.*" *In re Saulsbury Orchards & Almond Processing, Inc.,* 50 Agric. Dec. 23, 165, slip op. at 162 (1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), quoted in § XII(D), *infra.* For the same reason, respondent's contention, that *res judicata* (issue preclusion) applies to the issue as to whether assessments can properly fund CTFA, is without merit because it was held in *Wileman I* that the issue was not properly in the case because it was not raised in the Amended Petition (*Wileman I,* 49 Agric. Dec. at 795, slip op. at 87-88). Accordingly, *res judicata* (issue preclusion) does not apply.

With regard to the maturity and size regulations for 1988 and future years, the petitioners seek to raise a legal issue as to whether there is constitutional or statutory authority for the Secretary to delegate to the Committees and subcommittees certain functions regarding changes and variances in particular color standards (Amended Petition, ¶¶ 5, 6, 44(m), 50, 52, 62(E)). The basic question of constitutional and statutory authority for such delegation was litigated and determined in *Wileman I* (49 Agric. Dec.

at 812-29, slip op. at 105-22). Hence, this issue must be dismissed under *res judicata* (issue preclusion).[13]

Similarly, *res judicata* (issue preclusion) applies to numerous other maturity issues relating to the use of color chips and other tests to determine maturity, what occurred during the 1980 through 1987 seasons, and whether the use of color chips and other tests is arbitrary and capricious, since these issues were decided in *Wileman I* (49 Agric. Dec. at 796-831, slip op. at 88-124). See § XIV, *infra.*

However, I disagree with respondent's argument (Motion to Dismiss at 10) that *res judicata* (issue preclusion) applies to whether the Secretary can ever enact regulations which limit the grade, size, and maturity of fruit which may be handled, since that issue was not directly decided in *Wileman I.*

Finally, I disagree with respondent's argument (Motion to Dismiss at 10-11) that *res judicata* (issue preclusion) applies to petitioners' argument that the rules of practice and interim-relief policy fail to provide adequate and timely relief. Since I held that petitioners were not entitled to any relief in *Wileman I*, I did not address the issue, just as I am not addressing it here, for the same reason.

V. The Promotional Programs Under Marketing Orders 916 and 917 Present No Impingement on Petitioners' First Amendment Rights.

Petitioners assert that the effect of the promotional programs conducted under Marketing Orders 916 and 917 is to compel petitioners to engage in "forced advertising," which amounts to forced speech and forced association in violation of the First Amendment. Petitioners' argument is

[13]The issue of the legality of how such delegation was accomplished is ripe for consideration in the present proceeding since the delegation has been accomplished for 1988 and the future in regulations, which was issued in 1988, and have not been litigated previously.

summarized by the ALJ as follows (Initial Decision at 196-97).

> Summarized, their position is that the Agricultural Marketing Agreement Act permits the Secretary to collect assessments from handlers regulated under a Marketing Order for purposes of any form of advertising (7 U.S.C. § 608(6)(I)). The Secretary, adopting the preferences of the Nectarine, Plum and Peach Committees, through the California Tree Fruit Agreement, has opted for the use of "generic" rather than brand name specific advertising. Wileman/Kash assert that to compel them to provide financial support for the advancement of any economic, ideologic and/or commercial beliefs, particularly those with which they disagree, violates their Constitutional right of freedom of speech and association, both as individuals and in the commercial setting.

Although the ALJ did not decide the First Amendment issue (since she held in petitioners' favor on non-constitutional issues), she believed that petitioners' First Amendment rights were violated (Initial Decision at 306-60), and stated that "if Petitioners were not to succeed in their non-constitutional arguments, I would rule in their favor on their First Amendment rights" (Initial Decision at 360).

In my view, the promotional programs in question do not infringe upon any First Amendment rights of petitioners. The programs neither compel nor prevent petitioners from speaking, advertising or expressing themselves in any way. The programs merely allow for generic commercial advertising, as approved by the Secretary and

authorized by Congress, to be conducted to benefit growers and handlers of California peaches, plums and nectarines. The programs, in fact, conduct commercial advertising designed *only* to encourage the purchase of California peaches, plums and nectarines, which petitioners produce and handle. The programs fall well within the power of Congress to regulate under the Commerce Clause, and present no danger of "forced speech" or "forced association."

Petitioners cite no speech or activity with political, philosophical, or ideological content that is undertaken with the assessment funds. Indeed, petitioners cite nothing in the content of the advertising done under the Orders which may be claimed to be ideologically offensive. Petitioners challenge only the effectiveness of the advertising conducted under the programs, as compared to the effectiveness of their own advertising. However, the effectiveness of a handler's private advertising is not relevant to a determination of the constitutionality of the AMAA, or of the promotional programs authorized by Marketing Orders 916 and 917.

It is not our function to determine policy. Policy questions as to the wisdom or effectiveness of a program are solely in the hand of Congress. *See Railway Employees' Dep't v. Hanson,* 351 U.S. 225, 234 (1956). Congress conducted hearings to determine whether such a program would be in the interest of producers, handlers and the general public. Congress delegated authority to the Secretary of Agriculture to further determine on the basis of formal rulemaking hearings whether the promotional programs would effectuate the declared policy of the Act as it pertains to California peaches, plums, and nectarines. Congressional hearings and formal rulemaking hearings conducted by the Secretary provide the appropriate forum for taking evidence as to the wisdom of the Act and Order provisions. "With respect to factual contentions, the

(15)(A) process can only test the validity of the Order by the facts contained in the promulgation hearing record—which are not challenged by petitioners. Hence petitioners seek relief in the wrong forum." *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 99 (1988), *aff'd in part an demanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990). See § III, *supra.* If petitioners feel that the program is ineffective, their appropriate avenue of redress is an appeal to Congress or request for formal rulemaking to the United States Department of Agriculture.

In any event, the Supreme Court of the United States has denied review of the decision of the United States Court of Appeals for the Third Circuit in *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 1168 (1990), which found the identical challenges to those raised by petitioners here to be without merit. Thus, petitioners' challenges to the Marketing Orders under the First Amendment are without merit.

A. Petitioners' "Forced Speech" Claim Has No Basis in Law or Fact.

1. The "Forced Speech" Doctrine Is Inapplicable to Commercial Speech.

Although the Supreme Court of the United States has extended First Amendment protection to commercial speech in order to ensure that the public is not denied the free dissemination of commercial information, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 766-70 (1976), the Court has never recognized a right to refrain from engaging in commercial speech. Nothing in the AMAA, the Orders or

the regulations prevents the dissemination of commercial speech. Thus, petitioners' claim is without merit.

In *Virginia State Bd. of Pharmacy,* the Court struck down a statute which prohibited pharmacists from advertising their prices for prescription drugs, holding that the statute kept "the public in ignorance of the entirely lawful terms that competing pharmacists are offering." 425 U.S. at 770. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 562 (1980), the Court also invalidated a regulation that completely banned promotional advertising by an electric utility, citing the vital interest of keeping "open the channels of communication," citing *Virginia State Bd. of Pharmacy,* 425 U.S. at 770. Indeed, the application of the First Amendment by the Supreme Court to commercial speech has been based on society's "strong interest in the free flow of commercial information." *Friedman v. Rogers,* 440 U.S. 1, 8-9 (1978). As stated by the Court in *Zauderer v. Office of Disciplinary Counsel,* 471, U.S. 626, 651 (1985), "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides. . . ." Thus, the Supreme Court has extended First Amendment rights to commercial speech only in cases in which a statute or regulation *prohibits* commercial speech. The Supreme Court has never recognized the existence of a right to refrain from commercial speech. Therefore, the facts of this case simply do not raise a colorable First Amendment claim.

Under the AMAA, the Orders, and the regulations, the petitioners are entirely free to advertise on their own. In fact, the AMAA expressly bans regulations restricting the advertising of regulated commodities in § 8c(10) (7 U.S.C. § 608c(10)):

> No order shall be issued under this chapter prohibiting, regulating, or restricting the

> advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

Petitioners presented evidence that they advertise their own peaches, plums and nectarines under their brand name labels through labels and stickers attached to fruit and fruit containers (Ex. 316, 317, 318, 320), promotional displays in stores (Ex. 319), posters (Ex. 321) and advertising brochures (Ex. 341). Thus, the AMAA, the Orders, and regulations do nothing to prevent petitioners from disseminating information about their product to consumers. This removes the present case from the First Amendment protection extended to commercial speech by the Supreme Court. Petitioners' claim that they would have more money to spend on their own advertising, if they did not have to pay their pro rata share of the Orders' advertising programs, does not rise to the status of a *Federal prohibition* against their own advertising, which would give rise to a First Amendment issue.

2. The Promotional Programs Conducted Under Marketing Orders 916 and 917 Do Not Require the Petitioners to Speak or Engage in Expressive Conduct of Any Kind.

As discussed above (§ V(A)(1)), petitioners have no First Amendment right to refrain from engaging in commercial speech. Nonetheless, assuming, *arguendo,* that petitioners could establish such a right, their claim would fail. Petitioners simply have not been forced to speak by the challenged Orders.

No provision of the AMAA, Orders or regulations forces petitioners to engage in speech. The AMAA allows the

Secretary to approve commercial speech undertaken by the respective Committees under the Orders, funded by assessments collected under those Orders. While petitioners are required to pay their share of assessments, petitioners are not forced to speak themselves. They are not forced to place signs on their property, or to place labels on their fruit or their containers. None of the promotional activities of the Marketing Order programs associates petitioners with the advertisements. Nor do the programs involve content of an ideological nature.

As such, the promotional programs under the Marketing Orders fall wholly outside the "forced speech" doctrine, as defined by the Supreme Court. The cases in which the Supreme Court has found that statutes impermissibly "force speech" implicate interests which are not "of the same order" as those presented here. *Zauderer,* 471 U.S. at 651. In *Wooley v. Maynard,* 430 U.S. 705, 715 (1977), the Court struck down a New Hampshire statute's requirement that each automobile license plate carry the slogan "Live Free or Die" because it required the Maynards to "use their private property as a 'mobile billboard' for the State's ideological message." Petitioners here are not required to display, wear, or include any of the Committee advertising on their person or property in any way. Further, *Wooley* involved ideological speech with which the Maynards disagreed. The "speech" conducted under the Marketing Orders' promotional programs is purely commercial (See Ex. 298, 301-303).

In *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943), the Court struck down a statute which required public school students to recite the Pledge of Allegiance to the American flag. Again, that statute forced the complainants to do the speaking, and it was speech of an obviously ideological content. The AMAA, the Orders and the regulations require no such activity on the part of petitioners.

Petitioners have alleged no activities supported by assessment funds which would constitute ideological activity with which petitioners disagree. Petitioners cite no instances of political or ideological expenditures undertaken with assessment funds. As can be seen by an examination of the advertising conducted under the Order, the only expenditures of advertising assessments taking place are for generic commercial advertising. Television commercials show children eating California fruit (Ex. 301). Posters display fresh California peaches, plums and nectarines (Ex. 256, 259). Radio commercials speak of the upcoming availability of California peaches, plums and nectarines (Ex. 302, 303). These expenditures are on purely commercial speech. Indeed, Mr. Jonathan Field, manager of the California Tree Fruit Agreement, the employee hired by the Committees to carry out administrative duties under the Order, created various charts to detail just how every dollar of assessment money spent on advertising is used. See Ex. 348-353. As demonstrated through the budget material provided to the Secretary by the Committees (Ex. 297(A)-(KK)), the representative samples of the radio and TV scripts (Ex. 301-303), the charts detailing advertising expenditures (Ex. 348-353), and the testimony of Mr. Field, assessment funds are spent only on commercial advertising promoting the California fruit regulated under the Orders. No assessment funds are spent on political or ideological activity.

What petitioners disagree with is the effectiveness of generic advertising. It is their opinion that generic advertising does not work. As a matter of policy, they feel that the money they pay for such generic advertising is not being well-spent. Although such notions may be appropriate considerations for a rulemaking hearing (*Secretary of Agric. v. Central Roig Ref. Co.,* 338 U.S. 604, 610-14 (1950)), they do not make for a First Amendment claim.

In *Pacific Gas & Elec. Co. v. Public Utils. Comm'n,* 475 U.S. 1 (1986), the Court ruled that a public utility could

not be forced to disseminate messages of consumer groups with which it disagreed. *Pacific Gas* differs from the present case in several crucial respects. The order by the Public Utility Commission in *Pacific Gas* required the utility company itself to disseminate the information in its own billing envelopes. The regulation in *Pacific Gas,* unlike the regulations of Marketing Orders 916 and 917, forced the company to use its own property to disseminate the information. Furthermore, the information that the company was forced to disseminate contained a discussion of matters of public concern affecting core First Amendment values, and "access is awarded only to those who disagree with appellant's views and who are hostile to appellant's interests." *Id.* at 14. Two of the acknowledged purposes of the access order were to "offer the public a greater variety of views in appellant's billing envelope, and to assist groups . . . that challenge appellant in the Commission's ratemaking proceedings in raising funds." *Id.* at 12-13. Thus, the distinctly content-driven nature of the Commission's order, according to the Court, could force the utility company to disseminate messages that might "urge appellant's customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business." *Id.* at 15. The AMAA and the Marketing Orders allow for generic advertising only. 7 U.S.C. § 608c(6)(I). No messages of ideological, political, or philosophical content are allowed to be, or have ever been, disseminated with the use of assessment funds.

Pacific Gas thus illuminates the meritlessness of petitioners' claim. The only "speech" conducted or allowed under the Orders is commercial speech encouraging consumers to eat California peaches, plums, and nectarines, which are products that the petitioners are in business to sell.

Petitioners cite *Century Communications Corp. v. FCC,* 835 F.2d 292 (D.C. Cir. 1987), *cert. denied,* 486 U.S. 1032

(1988), in support of their First Amendment claim. However, that case is similarly distinguishable. In *Century Communications,* the court struck down "must carry" rules promulgated by the FCC that required cable operators to transmit "local" over-the-air television broadcast signals for a period of 5 years. These signals informed viewers of their opportunity to watch "free television" through the use of a converter device. Thus, like the utility company in *Pacific Gas,* the cable operators were required to disseminate with the use of their private property a message that was in direct contradiction to their interests.

In addition, the court in *Century Communications,* in reaching its decision that the "must carry" regulation violates the First Amendment, applied a test which more recent Supreme Court holdings indicate does not apply to commercial speech. The court in *Century Communications* struck down the rules for applying the test set out in *United States v. O'Brien,* 391 U.S. 367, 377 (1968), in which the Supreme Court held that, to withstand First Amendment scrutiny, a regulation incidentally burdening speech and not aimed at the suppression of free expression must advance a substantial governmental interest and must be no more restrictive than necessary to accomplish that end. *See Century Communications,* 835 F.2d at 298-303. However, the Supreme Court in *Board of Trustees of State Univ. of New York v. Fox,* 492 U.S. 469, 477 (1989), specifically ruled that government regulation of commercial speech is not to be scrutinized under the "least-restrictive-means" test. *See also Ward v. Rock Against Racism,* 491 U.S. 781, 796-802 (1989). In *Fox,* the Court held (492 U.S. at 477):

> Our jurisprudence has emphasized that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First

> Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978). The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrictive-means requirement, which imposes a heavy burden on the State.

In determining the appropriate test for government regulation which impinges on commercial speech, the Court stated in *Fox* (492 U.S. at 480):

> In sum, while we have insisted that "'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful.'" *Shapero [v. Kentucky Bar Assn.]*, 486 U.S., at 478 [1988], quoting *Zauderer*, 471 U.S. at 646, we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends," *Posadas [de Puerto Rico Assoc. v. Tourism Company of Puerto Rico]*, 478 U.S. at 341-a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest being served," *In*

> *re R.M.J., supra,* [455 U.S., at 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

The Court in *Fox* elaborated on the reduced standard of review the Court was applying as compared to noncommercial speech (492 U.S. at 480-81):

> By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) "traditionally subject to governmental regulation," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. at 455-45. . . . "To require a party of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech." *Id.* at 456.

Thus, in light of *Fox*, petitioners' reliance on cases such as *Century Communications*, which apply a "least-restrictive-means" test to government regulation of commercial speech, is inappropriate.

As discussed above, no impingement of petitioners' speech occurs as a result of the promotional programs

conducted under the Orders. Petitioners are not prevented from engaging in speech of any kind, nor are they forced to speak. Nonetheless, the promotional programs manifestly survive scrutiny under the test enunciated in *Fox*: The fit between Congress' ends and the means chosen to accomplish those ends is clearly reasonable.

Congress determined that it is in the interest of the public as well as growers and handlers of agricultural commodities to encourage the consumption of agricultural products. Pursuant thereto, Congress devised a plan to enable the Secretary to implement a program calling for advertisement of those products to be funded by the handlers of those commodities. Thus, the reasonableness of Congress' actions in the area of the promotion of agricultural commodities is readily apparent.

Moreover, the regulation of the agricultural industry has long been held to be constitutionally placed in the hands of Congress and, to the extent delegated to him by Congress, the Secretary of Agriculture. *See United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). Courts reviewing such statutes and regulations must be "loath to second-guess the Government's judgment to that effect." *Fox*, 492 U.S. at 478.

B. Petitioners' "Forced Association" Claim Has No Basis in Law or Fact.

Petitioners rely exclusively on cases involving "union-shop" arrangements to support their "forced association" claim. However, these cases squarely support the position of respondent.

As early as 1956, in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), the Supreme Court upheld a mandatory assessment program over a First Amendment challenge. In *Hanson*, a statute authorizing union representation of railroad employees permitted an "agency

shop" arrangement whereby every employee represented by a union must pay to the union, as a condition of employment, a service charge equal in amount to the union dues. The Court held that "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments." *Hanson*, 351 U.S. at 238.

In discussing the broad congressional authority enjoyed by Congress to regulate interstate commerce, the Court stated that "the power of Congress to regulate labor relations in interstate industries is . . . well-established. Congress has authority to adopt all appropriate measures to 'facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation.'" *Hanson*, 351 U.S. at 233, citing *Texas & N.O.R. Ry. Clerks*, 281 U.S. 548, 570 (1930). The Court further found that "[i]ndustrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained." *Hanson*, 351 U.S. at 233.

Likewise, Congress has broad authority to regulate agricultural commerce because the "disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and . . . these conditions affect transactions in agricultural commodities with a national public interest and burden and obstruct the normal channels of interstate commerce." 7 U.S.C. § 601.

In holding that the congressional decision to allow union ships to stabilize the work force was an allowable one, the Court in *Hanson* noted that the wisdom of such a decision is left solely to Congress. The Court noted (351 U.S. at 233-34):

> Much might be said *pro* and *con* if the policy issue were before us. Powerful arguments have been made here that the long-run interests of labor would be better served by the development of democratic traditions in trade unionism without the coercive element of the union or the closed shop. . . . But the question is one of policy with which the judiciary has no concern. . . . Congress, acting within its constitutional powers, has the final say on policy issues. If it acts unwisely, the electorate can make a change. The task of the judiciary ends once it appears that the legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises.

It is arguments of policy that petitioners hope will render the AMAA promotional provisions unconstitutional. Petitioners argue that the advertising done under the Orders is not effective and that their money would be better spent on advertising conducted under their own brand name. But these are arguments of policy appropriately made to the Secretary in formal rulemaking hearings or in a request to the Secretary to conduct formal rulemaking. Such arguments are inappropriate in a § 8c(15)(A) proceeding, and do not speak to the legality of the challenged provisions. Such arguments would also be appropriate before Congress when it conducts hearings on the inclusions of such provisions in the AMAA. And, of course, the ultimate voice of the people is the power to vote. As the Supreme Court has stated. "If [Congress] acts unwisely, the electorate can make a change." *Hanson,* 351 U.S. at 234.

The Court relied on the reasoning in *Hanson* to uphold the union shop arrangement in *Abood v. Detroit Bd. of*

Educ., 431 U.S. 209 (1977), insofar as the service charges were used to finance expenditures by the union for collective-bargaining purposes. It was only for those "expenditures for legislative lobbying and in support of political candidates" that stated a cause of action under the First Amendment. *Abood,* 431 U.S. at 215. Similarly, in *International Ass'n of Machinists v. Street,* 367 U.S. 740, 744 (1961), the record contained findings that the union treasury to which all employees were required to contribute had been used "to finance the campaigns of candidates for federal and state offices whom [the plaintiffs] opposed." It was these expenditures that gave rise to the First Amendment action. And in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986), the parties stipulated that a portion of the assessments were used for ideological purposes. The only question before the Court was whether the procedure for returning the portion of assessments used for ideological expenditures was sufficient. No such quandary is present here, since no assessments are spent on ideological expenditures.

In *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks,* 466 U.S. 435, 477 (1984), the Court reaffirmed the reasoning of *Hanson* and *Abood* that there is "no constitutional barrier to an agency shop agreement . . . insofar as the agreement required every employee in the unit to pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustment. The union, however, could not, consistently with the Constitution, collect from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent."

Ellis, however, went a step further to define the line between union expenditures, that all employees must help defray, and those that are not sufficiently related to collective bargaining to justify their being imposed on dissenters. The Court stated that "the test must be whether

the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." *Id.* at 448. Under this analyses, the Court found that expenditures for conventions and social activities were appropriately funded through dues collected from all employees. The Court stated (466 U.S. at 448-49):

> We have very little trouble in holding that petitioners must help defray the costs of these conventions. Surely if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy. Conventions such as those at issue here are normal events about which Congress was thoroughly informed [footnote omitted] and seem to us to be essential to the union's discharge of its duties as bargaining agent.

The Court additionally held that publications and litigation dealing with collective bargaining issues are appropriate uses of dissenters' dues. *Ellis,* 466 U.S. at 448, 450-53.

Another recent case continues the principles articulated in the *Abood/Ellis* line of cases. In *Keller v. State Bar of California,* 110 S. Ct. 2228, 2236 (1990), the Court found that the California State Bar, an integrated bar to which all those licensed to practice law in California must belong, is "justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* The Court held that "the State Bar may therefore

constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* The Court did hold that the State Bar may not, however, use mandatory dues to "fund activities of an ideological nature which fall outside of those areas of activity." *Id.* The Court noted that the difficult question is to "define the latter class of activities." *Id.* The guiding standard to distinguish such expenditures must be whether the challenged expenditures are "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.,* quoting *Lathrop v. Donohue,* 367 U.S. 820, 843 (1961).

Thus, the allowable expenditures under the promotional programs of Marketing Orders 916 and 917, if analyzed under the union shop cases, must be necessary or reasonable for the purpose of performing the duties defined under the AMAA, the Orders and regulations as Congress envisioned. While noting the difficulty in drawing the line between allowable expenditures furthering the goals of the statutory mandate and impermissible ideological or political expenditures, the Court also noted that the "extreme ends of the spectrum are clear." *Keller,* 110 S. Ct. at 2237. The Court's illustration of the impermissible extreme included expenditures on endorsement of gun control or a nuclear weapons freeze initiative. At the other extreme, the Court notes such permissible expenditures as those on activities related to disciplining members of the bar—activities for which "petitioners have no valid constitutional objection to their compulsory dues being spent." *Id.*[14]

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[14] Another concern of the Court in *Keller* was whether a procedural device was in place to assure that *mandatory* dues are in fact used for only permissible purposes, and that those who do not wish to fund the political activities of the bar have the opportunity to withhold payment of that portion of their dues, as the Court in *Abood* required. *Keller,* 110 S.Ct. at 2237-38. That is not a concern here since *no* political activity is undertaken with assessment funds. Such expenditures are not allowed by the Secretary, who approves every budget.

It is just such extremes that are present in the factual scenarios of the *Keller* case and the case before us now. In *Keller,* the mandatory dues were being used to fund such activities as opposition to the federal legislation limiting federal court jurisdiction over abortions, public school prayer and busing. *Keller,* 110 S. Ct. at 2231-32 n.2. In contrast, petitioners here have cited no instances where the assessments collected under the Orders have been used for anything other than the promotion of California fruit. Activities funded under the Orders consist only of the administrative expenses of the Committee, research on peaches, plums, and nectarines and generic commercial advertising promoting the sale of California peaches, plums and nectarines—activities reasonably and necessarily related to the goals of the AMAA and Marketing Orders 916 and 917. No political or ideological activities are undertaken with assessment funds.[15]

Thus, as discussed earlier, the promotion of California fruit furthers the government's compelling interest of improving returns to growers and stabilizing the agricultural industry, thereby serving the public interest. *See*

[15]The ALJ refers to the moral objections of Mr. Chang, president of Kash, Inc., to one television advertisement run during the 1986 through 1988 seasons (Initial Decision at 322-23). However, there is no merit to this issue. Mr. Chang testified that the TV commercial (Ex. 301(b)) showed a young girl in a bathing suit who was sexually stimulating. The little girl, who appears to be about 6 years old, and her dog, ran through a lawn springler to a bowl of peaches, picked out one, and began to eat it, while the background jingle played and the background singer sang: "Remember that special feeling called summer? Remember the taste of summer peaches, so cool, juicy and good for you. Summer, summer fruits from California, fresh from the tree, taste them and see!" Mr. Chang admitted that he was not personally sexually stimulated by the commercial, and could not identify anyone who was (Tr. 2963-66, 3173-76, 3327-54). Respondent's witness Jon Field, the Committees' manager, testified that no complaints had ever been received from anyone regarding this commercial (Tr. 4757-58). There is no basis for an "ideological" claim based on this commercial. However, respondent's argument that this issue was not adequately raised in the Amended Petition is not well taken (see Amended Petition, ¶¶ 13, 31-33, 53(a), 54, 62(L), (M)).

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942). Mandatory assessments are, therefore, justified by the government's interest, and the advertising assessments are used only for the necessary and reasonable expenses of conducting generic, commercial advertising programs. Petitions were unable to show impermissible activity undertaken with assessment funds. Petitioners merely made assertions that the advertising conducted under the Orders has not helped their business, but as stated in *Ellis,* "Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Ellis,* 466 U.S. at 456.

C. Petitioners' First Amendment Claims Have Been Rejected.

The identical challenges to the Beef Research and Promotion Act of 1985 that petitioners have raised here were rejected in *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989), *cert. denied,* 110 S. Ct. 1168 (1990). That case was an appeal of the summary judgment motion granted to the government by the district court, which rejected the very First Amendment challenges to the Beef Promotion and Research Act of 1985 (Beef Act) (7 U.S.C. § 2901 *et seq.* (1988)) that petitioners have raised here regarding the AMAA and Marketing Orders 916 and 917. In affirming the lower court decision, the court held that congressionally-designed programs that authorize commercial advertising to promote a commodity in interstate commerce in order to encourage the consumption of that commodity are in the public interest as well as in the interest of those in the industry being promoted, and do not constitute a violation of the First Amendment to the Constitution of the United States (885 F.2d at 1137).

The court found in favor of the government on all challenges to the Beef Act, an Act which is patterned after

the AMAA. The First Amendment challenge in *Frame* was raised as a defense to a civil action brought against Mr. Frame, a producer and handler of beef, who refused to remit his assessments to the Cattlemen's Beef Promotion and Research Board (Cattlemen's Board). Relying primarily on *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), Mr. Frame, like petitioners here, argued that his rights of free association and free speech under the First Amendment are violated by the operation of the Beef Act. Similarly, Mr. Frame argued that "the Act breaches his constitutional right to refrain from speaking, because it compels him to participate administratively and financially in the promotion of a cause (an advertising campaign 'to strengthen and preserve the position of beef and beef products in the marketplace') and a message (the consumption of beef is 'desirable, healthy, nutritious') with which he disagrees." *Frame*, 885 F.2d at 1129.

The court rejected these claims. The court noted as an initial matter that "'freedom of association' while protecting the rights of citizens to engage in 'expressive' or ' intimate' association, does not protect every form of association." *Id.* at 1131 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 24-26 (1989)). Therefore, the court found that the aspect of the Beef Act, which imposes the assessments for *research* purposes, qualifies as neither expressive nor intimate association, and therefore does not implicate Mr. Frame's First Amendment rights. The court did find, however, that the *promotional* program under the Act implicated Mr. Frame's First Amendment rights.[16]

Although *Frame* conceded that the speech at issue was "commercial speech," which the Supreme Court has held

[16]In my view, the promotional programs under Marketing Orders 916 and 917 implicated no First Amendment rights of petitioners. The Supreme Court has not recognized a right to refrain from commercially speaking or associating. See § V(A), (B), *supra*. However even if petitioners' First Amendment rights are implicated, there is still no violation of their First Amendment rights, as demonstrated by *Frame*.

receives a lesser degree of First Amendment protection, *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), the court applied the "compelling state interest" test set forth in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), because, according to the court, Frame's associational claims triggered a higher level of scrutiny.[17] *Frame*, 885 F.2d at 1134. Applying this test, the court held that the promotional program of the Beef Act was valid under the First Amendment because "the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Id.* at 1134. *See Roberts*, 468 U.S. at 623. As shown immediately below in the following three subsections, the same result is required here.

1. The Government's Interest.

The government's interest in promoting the consumption of California peaches, plums and nectarines is compelling and important. The court stated in *Frame* that "Frame's characterization of the government interest here as 'the interest in advertising beef,' virtually concedes the importance of the interest cast by Congress: preventing further decay of an already deteriorating beef industry" (885 F.2d at 1134). Petitioners here concede that there is a compelling governmental interest in the regulation of the

[17]I believe that the test in *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), provides the appropriate standard of review to apply in this case (see § V(A)(2)). That test requires merely that the government regulation bear a reasonable fit to the government's important interest. However, as shown in the following three subsections, even under the heavy burden of proof applied in *Frame*, the promotional programs under Marketing Orders 916 and 917 easily stand up to constitutional scrutiny. It should also be noted that in the recent case of *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990), discussed above (§ V(B)), the Court applied a *Fox* type test to petitioner's associational claim—not the "compelling interest test" applied by the court in *Frame*.

tree fruit industry, stating (Petitioners' Brief filed May 16, 1990, at 56; and see Petitioners' Brief filed July 5, 1990, at 66-67):

> Wileman/Kash do not deny that the government has a compelling interest in regulating the quality of fruit that is disseminated to the American public. Although the mere existence of the AMAA constitute a significant impingement upon First Amendment rights of handlers, that impingement is amply justified by the compelling governmental interest in the regulation of the tree fruit industry to establish and maintain orderly marketing conditions and to insure that minimum standards of quality and maturity are complied with.

Petitioners thereby concede the compelling interest furthered by the general purposes of the AMAA. It is this same interest that led Congress to amend the AMAA to allow for promotional programs to be conducted under Marketing Orders, and that was recognized by the Supreme Court in *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). "[T]he principal purposes of [the Act] are to raise the price of agricultural products and to establish an orderly system for marketing them." *Id.* at 346. Thus the compelling interests of raising agricultural prices and establishing an orderly marketing system, which have long been recognized, support the plan of Congress and the Orders here: To advertise California peaches, plums and nectarines in an attempt to increase demand, in order to increase prices and provide for orderly marketing conditions.

2. Ideological Neutrality.

The court in *Frame* had no trouble finding that the purposes underlying the Beef program are ideologically

neutral, and the same conclusion must be drawn regarding the California peach, plum and nectarine promotional programs. The court found that the federal government under the Beef program seeks only to "bolster the image of beef solely to increase sales" (*Frame*, 885 F.2d at 1135). This is the very goal of the government under the promotional programs authorized by the AMAA. Petitioners do not cite one instance whereby the promotion conducted under the Marketing Orders constituted the communication of an "official view" or "prescribe[d] orthodoxy." *See Frame*, 885 F.2d at 1135 (citing *Wooley v. Maynard*, 430 U.S. at 716-17). No political or ideological activity has ever been conducted under these Orders. Thus, the advertising programs challenged here are as easily found to be "ideologically neutral," as the court in *Frame* found the Beef program.

3. Degree of Infringement.

The court held in *Frame* that the promotional programs of the type challenged here present slight infringement on First Amendment rights. The court noted that the incursion is especially slight in comparison with the "broad constitutional incursions arising from agency and union shop agreements and countenanced in *Hanson*, *Street*, and *Abood*" (*Frame*, 885 F.2d at 1136). The court noted that the Cattlemen's Board is authorized only to develop a campaign to promote the product that Mr. Frame is himself in business to sell, whereas the union shop arrangements found to be constitutional allow the unions to engage in activities that necessarily implicate a broad range of ideological, moral, religious and economic and political interests. *Id.* at 1135-36. (E.g., Unions may negotiate a medical plan that authorizes payments for abortions.)

The same is true under the promotional programs under challenge here. The "speech" conducted under the Orders is exclusively designed to promote California peaches,

plums and nectarines, products that petitioners are in business to sell.

Finally, in *Frame* the court expressly rejected Mr. Frame's hollow attempts at proving a "philosophical disagreement" with the promotion under the Act. The court stated (885 F.2d at 1137):

> Frame has vaguely claimed that the Cattlemen's Board "promotes a specific point of view, i.e., that the consumption of beef is desirable, healthy, nutritious," and he disagrees with the Board's "message and methods." Frame has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy. *See Abood,* 431 U.S. at 223.

This is the very defect with the complaints of petitioners. Representatives of petitioners, while making the conclusory statement that they had a philosophical difference with the message of the program, never explained that philosophical disagreement. Instead, they merely testified that the program is ineffective. But as previously explained (§ V(B)), Petitioner's may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Ellis v. Brotherhood of Ry., Airline & Steamship Clerks,* 466 U.S. 435, 456 (1984).

A meritless contention of petitioners that was raised at the oral hearing, but not raised in the Amended Petition, and that may not, therefore, be considered (§ II(A), *supra*), is that the expenditures of a non-profit corporation, the Tree Fruit Reserve, are attributable to the Marketing Orders. Petitioners put forth no evidence that this is a sustainable claim. As discussed below (§ IX), the Committees rent a building and some equipment, at a reasonable

rate as determined by the Secretary in his approval of the budget, from the non-profit corporation, the Tree Fruit Reserve (Ex. 387, 388). What the Tree Fruit Reserve does with that money is not the responsibility of the Marketing Orders, the Committees or the Secretary of Agriculture. What a landlord does with his lessee's money is not under the lessee's control. Thus, whatever expenditures are undertaken by the Tree Fruit Reserve (whether lobbying or non-lobbing expenditures) are not under the control of the Secretary or the Committees under the Orders, and have no bearing on the constitutional claims herein. No assessment money was used for lobbying or ideoiogical activities. Petitioners' claims pertaining to the Tree Fruit Reserve may not be litigated herein, and even if they were to be considered, they are without merit (see § IX, *infra*). Furthermore, as noted by the ALJ (Initial Decision at 200-10, 306-60), they are not part of petitioners' First Amendment claims.

VI. The Promotional Programs Under Marketing Orders 916 and 917 Do Not Violate the Fifth Amendment to the Constitution of the United States.

A. There Is No Due Process Violation.

Petitioners' reliance on the Due Process Clause protection of the Fifth Amendment to support their allegations that the economic regulations at issue here are unconstitutional is an attempt to revive a doctrine which was repudiated by the Supreme Court long ago. No economic regulation has been invalidated on substantive due process grounds since 1937. G. Gunther, *Constitutional Law* 472 (11th ed. 1985). "Indeed opinions from the Court are rare, for most appeals raising substantive due process challenges

are dismissed for want of a substantial federal question...." *Id.* Since the demise of the "*Lochner* Era,"[18] the Court has repeatedly stated its determination to keep "hands off" economic regulations, such as those which regulate agricultural products in interstate commerce. *See United States v. Carolene Prods. Co.,* 304 U.S. 144 (1938); *see also Olsen v. Nebraska ex rel. Western Reference & Bond Ass'n,* 313 U.S. 236 (1941); *Lincoln Fed. Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U.S. 525 (1949); *Ferguson v. Skrupa,* 372 U.S. 726 (1963).

The modern day due process analysis regarding economic regulation can be summed up by *Williamson v. Lee Optical of Okla., Inc.* 348 U.S. 483, 488 (1955):

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause ... to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

Petitioners' attempt to revive this doctrine, dead for over 50 years, is rejected.

As stated in *Lee Optical* (348 U.S. at 488), economic regulations need only pass the "rational" relationship test. The Supreme Court used this test to reject claims brought under the Due Process Clause that Marketing Orders

[18] From the time of the *Lochner* decision, *Lochner v. New York,* 198 U.S. 45 (1905), to the mid-1930's, the Court invalidated a considerable number of laws on substantive due process grounds. That time period is commonly referred to as the "Lochner Era," and it represents a since-discredited period of judicial intervention, as discussed in this section.

represent an unconstitutional interference with the liberty and property rights inherent in the ability to contract freely. *United States v. Rock Royal Co-op., Inc.,* 307 U.S. 533, 572-73 (1939). In *Rock Royal,* the Court found that the restrictions of a Marketing Order were reasonably related to the power to regulate commerce, which the Court had found "complete and perfect." *Id.* at 569. *See also H.P. Hood & Sons, Inc. v. United States,* 307 U.S. 588 (1939). As discussed above (§ V), the promotional programs conducted under these Orders are reasonably related to the legislative objective of promoting the orderly marketing of California peaches, plums and nectarines, thereby increasing returns to producers and stabilizing the agricultural industry, which is in the public interest.

B. There Is No Equal Protection Violation.

Petitioners' claim that the promotional programs are a violation of the Equal Protection Clause, incorporated under the protections of the Fifth Amendment, is invalid. The use of the Equal Protection Clause to invalidate economic regulation has met with much the same fate as the Due Process Clause. *See Lee Optical,* 348 U.S. at 488-89. (The Court in *Lee Optical* "rejected the equal protection claim even more summarily than the due process one." G. Gunther, *Constitutional Law* 600 (11th ed. 1985)). As with the due process analysis, it need only be shown that the different treatment within the regulation "bear[s] 'some rational relationship to a legitimate state purpose" (*City of Dallas v. Stanglin,* 490 U.S. 19, 23 (1989)). Rational-basis scrutiny is the "most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Id.* at 26. Under this analysis, petitioners' claims fail.

As an initial matter, it must be noted that there is *no* differential application of the requirements imposed due to the promotional programs conducted under Marketing

Orders 916 and 917. All handlers regulated under the Orders pay the same per-carton assessment on their fruit. Thus, petitioners could not sustain a claim under the Equal Protection Clause claiming differential treatment of those regulated under the Orders. Petitioners' claim, that the promotional program assessment regulations create a discriminatory class between handlers of peaches, plums and nectarines in California and peach, plum and nectarine handlers in other areas not subject to promotional programs, fails because the regulation is based on a rational relationship to a legitimate government purpose *as determined by Congress. See Rock Royal,* 307 U.S. at 572.

Congress determined that it would be in the public interest to permit the Secretary of Agriculture to consider paid advertising programs for *certain specified* commodities (7 U.S.C. § 608c(6)(I)) in marketing areas "limited in their application to the smallest regional production areas ... which the Secretary finds practicable" (7 U.S.C. § 608c(11)(B)). The Secretary may consider, through formal rulemaking hearings, promotional programs for the commodities listed in 7 U.S.C. § 608c(6)(I) *only.* That list includes plums, nectarines and *California-grown* peaches. *Id.* Thus, even if the distinction were irrational, which it is not, such a finding would require a ruling that the Act is unconstitutional, which this agency may not do. *Oestereich v. Selective Serv. Sys., Local Bd. No. 11,* 393 U.S. 233, 242 (1968). In *Frame,* the court held that a rational basis *clearly exists* for choosing the Beef producers to support the Board's activities. Likewise, a rational relationship clearly exists for assessing *California* handlers to advertise *California* fruit.

While the ALJ declined to decide the constitutional issues, nonetheless she expressed her view that the Act is unconstitutional in that it does not apply to all fruits or to all geographic areas. She erroneously categorizes this as a First Amendment issue, rather than a Fifth Amendment

issue (Initial Decision at 311-14, 356, 358; see generally Initial Decision at 306-60).[19] Furthermore, she fails to follow the proper Fifth Amendment test (rational relationship) in favor of a "compelling governmental interest" test, which she then applies back to First Amendment questions. The gist of her conclusion seems to be that the AMAA is unconstitutional since the government did not show that there is a rational reason (or a compelling governmental interest) why the statute and Orders do not cover all fruits and all geographic areas. This theory of the ALJ applies the wrong test, and has the burden of proof reversed. Furthermore, petitioners never challenged the formal rulemaking records for the Order provisions that track the statute. Rather, they only challenge the yearly applications, and, thus, never reach the evidence for the rational reasons or compelling governmental interest behind the statute and the Order provisions. Any Fifth Amendment (Equal Protection Clause) issue would have to be based on the formal rulemaking records upon which the Order provisions authorizing yearly advertising programs are based.

There is clearly a rational relationship between choosing California peach, plum, and nectarine handlers to advertise and the governmental interest of promoting the orderly handling of California peaches, plums and nectarines in the marketplace. The rational relationship test has been used by the Supreme Court before to uphold distinctions made between handlers under the Act. *Rock Royal,* 307 U.S. at 564-65. The classification of handlers regulated under Marketing Orders being limited to a particular geographic area stems from the requirements of the AMAA. The Act

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[19] Respondent's argument (Appeal Brief at 40), that this issue *as decided by the ALJ* was not raised in the Amended Petition, is accurate, but not well taken. The Amended Petition correctly raises this issue under the Fifth Amendment (Amended Petition, ¶¶ 14, 38, 62(N)), and, therfore, the issue, as raised in the Amended Petition, must be addressed on the merits.

requires that Marketing Orders be limited in their application to the smallest region practicable, consistent with effectuating the purposes of the Act, and that Marketing Orders applicable to the same commodity in different regions contain such different terms as are necessary to address these differences. 7 U.S.C. § 608c(11)(B), (C). Regional differences in commodity marketing are rationally related to regional differences in marketing regulation. The Supreme Court has stated (*Schweiker v. Wilson*, 450 U.S. 221, 234-35 (1981) (*see also Matthews v. De Castro*, 429 U.S. 181, 185 (1976)):

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] [brackets in original] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequity.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78." Dandridge v. Williams 397 U.S. at 485.

... As long as the classificatory scheme chosen by Congress rationally advances a

> reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

Since the advertising programs further a legitimate governmental interest, and all classifications under the Act are based on a rational relationship to that governmental interest, petitioners' equal protection claim is rejected.

Even if, as suggested by petitioners, the government must show that a "compelling governmental interest" is required to sustain the constitutionality of these programs, the AMAA remains well within constitutional bounds. As discussed above (§ V(C)), the court in *Frame* found that the Beef Act indeed serves a compelling governmental interest to improve the position of Beef producers and handlers in the marketplace. The AMAA likewise serves the compelling interest, conceded by petitioners (see § V(C)(1), *supra*), of stabilizing agricultural markets and increasing prices. The AMAA provision allowing for paid advertising of nectarines, plums, and California peaches (7 U.S.C. § 608c(6)(I)), and the provisions of Marketing Orders 916 and 917 promulgated thereunder, serve a compelling interest, and result in no discriminatory classification in violation of petitioners' equal protection rights.

A similar equal protection argument was rejected in *In re Sequoia Orange Co.*, 50 Agric. Dec. 216, 274-80, slip op. at 64-69 (1991), *appeal docketed sub nom. District One Independent Handlers v. Madigan*, No. CV-F-91-202 REC (E.D. Cal. Apr. 18, 1991), in which it is stated (50 Agric. Dec. at 274, slip op. at 64):

> Petitioners argue that the prorate regulations for navel oranges and lemons denied petitioners the equal protection of the laws. However, I agree with the ALJ's rejection of

that argument, as follows (Initial Decision at 31-32):

> Equal protection is an implicit requirement of the fifth amendment's due process clause, and the mandates of the fourteenth amendment's equal protection clause [applicable to the States] are applicable to actions of the Federal Government [under the Fifth Amendment, although the two protections are not always coextensive]. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). Equal protection analysis under the fifth amendment is [generally] the same as that used under the fourteenth amendment. *Buckley v. Valleo*, 424 U.S. 1, 93 (1976). Under that analysis, a legislative classification does not violate a person's right to equal protection merely because the classification may be imperfect. A classification is considered valid when it has a "reasonable basis" and it is not offensive to the Constitution simply because the classification "is not made with mathematical certainty or because in practice it results in some inequity." *Lindsley v. Natural Carbonic Gas Co.*,

> 220 U.S. 61, 78 [(1911)]; *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

For the foregoing reasons, petitioners' Equal Protection Clause argument is rejected on the merits.

VII. Congress Has Not Unlawfully Delegated the Power to Tax to the Secretary of Agriculture.

Petitioners contend that the congressional delegation to the Secretary of the authority to promulgate promotional assessment regulations is an unconstitutional delegation of the taxing power. The ALJ found it unnecessary to decide this issue (see Initial Decision at 197-99, 311). In fact, the assessments do not constitute a tax, but are assessed through the lawful delegation of Congress to the Secretary of Agriculture under the Commerce Clause. Further, whether or not the assessments constitute a tax, the delegation falls well within constitutional limitations.

The congressional delegation of authority to the Secretary of Agriculture to promulgate assessment regulations was an exercise of congressional authority under the Commerce Clause. The AMAA states (7 U.S.C. § 608(c)(1)):

> Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

This provision reflects the intent of Congress to invoke its Commerce Clause powers. The parties and the court determined this to be the case in *Frame*. "The parties now

agree that in enacting the Beef Promotion Act, Congress presumed that it was exercising its power under the Commerce Clause." *Frame*, 885 F.2d at 1125. As noted by the court, Mr. Frame, "at earlier stages in the litigation ... had argued that the assessments on beef constituted a 'tax,' *see United States v. Frame*, 658 F. Supp. [1476] at 1479 [(1987)], but [Mr. Frame] abandoned that claim on appeal." *Frame*, 885 F.2d at 1125 n.4. The court stated (885 F.2d at 1125):

> The Act's finding that "beef and beef products move in interstate and foreign commerce," or "directly burden or affect interstate commerce of beef and beef products," 7 U.S.C. § 2901(a), reflects this intent [to exercise congressional power under the Commerce Clause].

Thus, petitioners have wrongfully attacked the assessment as a tax, and their claims are rejected. However, the delegation to the Secretary, even if it had been under the taxing power, would have been lawful.

The Supreme Court reviewed an unlawful tax challenge in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989), and found that the Constitution places no stricter requirement on Congress in delegating its authority under the taxing power than it does on congressional authority to delegate under the Commerce Clause, and further found the challenged delegation well within constitutional limits. "Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution." *Skinner, id.* at 223.

The Court in *Skinner* stated that the following standard should be applied (490 U.S. at 218-19):

> Earlier this Term, in *Mistretta v. United States*, 488 U.S. [361], we revisited the nondelegation doctrine and reaffirmed our longstanding principle that so long as Congress provides an administrative agency with standards guiding its actions such that a court could "ascertain whether the will of Congress has been obeyed," no delegation of legislative authority trenching on the principle of separation of powers has occurred.... (It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority....")

In applying the foregoing standard, the Court in *Skinner* noted that enacting the challenged statutory provision, "Congress delimited the scope of the Secretary's discretion with much greater specificity than in delegations that we have upheld in the past." *Id.* at 219.

The Court then listed the limits placed on the Secretary of Transportation by Congress in enacting the provision allowing the Secretary to collect a user fee on users of an oil pipeline. The Secretary may not collect fees from firms not subject to either of the two Pipeline Safety Acts; he may not use the funds for purposes other than administering the two Acts; he may not set fees on a case by case basis, etc. (490 U.S. at 219-20). The Court concluded, "[w]e have no doubt that these multiple restrictions Congress has placed on the Secretary's discretion to assess pipeline safety user fees satisfy the constitutional requirements of the nondelegation doctrine as we have previously articulated them" (490 U.S. at 220).

The limitations on the Secretary of Transportation noted by the Court in *Skinner* are analogous to the limits placed on the Secretary of Agriculture in the AMAA. (Indeed, the court in *Frame* held that it is "plain that the Beef Act," which is modeled after the AMAA, "does not unlawfully

delegate legislative authority to the Secretary." *Frame,* 885 F.2d at 1128.) The Secretary of Agriculture may not collect assessments from any person not regulated under a Marketing Order (7 U.S.C. § 610(b)(2)(ii)); he may not use promotional funds for anything that does not effectuate the declared policy of Congress under the Act (7 U.S.C. § 602(3)); and he must apply a uniform assessment to all those regulated under a particular Order (7 U.S.C. § 610(b)(2)(ii)). Thus, Congress strictly limited the Secretary of Agriculture's discretion in the use of assessments, just as Congress limited the Secretary's discretion in *Skinner.* Hence the congressional authority delegated to the Secretary of Agriculture was not an unlawful delegation, whether it was under the Taxing or Commerce Clause power.

Petitioners cite *Panama Ref. Co. v. Ryan,* 293 U.S. 388 (1935), and *A.L.A. Schecter Poultry Corp. v. United States,* 295 U.S. 495 (1935). These two cases represent a failed doctrine that legislative bodies may not lawfully delegate their power to administrative agencies. *See* 1 K. Davis, *Administrative Law Treatise* § 3:2, at 150 (2d ed. 1978), *id.,* § 3:8 (1982 Supp.). Petitioners' attempt to roll back the clock to the 1930's is rejected.

A similar attempt to roll back the clock to the 1930's was rejected in *In re Sequoia Orange Co.,* 47 Agric. Dec. 2, 180-85 (1988), *aff'd in part on other grounds and remanded sub nom. Riverbend Farms, Inc. v. Yeutter,* No. CV F-88-98 EDP (E.D. Cal. June 14, 1989), *printed in* 48 Agric. Dec. 1 (1989), *appeal docketed,* No. 90-15505 (9th Cir. April 24, 1990), No. 90-15781 (9th Cir. June 11, 1990), in which it was held that the California-Arizona Navel Orange regulatory program under the AMAA does not involve an unconstitutional delegation of congressional authority, stating (47 Agric. Dec. at 182-85) (the initial portion of the following quoted material, through the paragraph following note 67, is from a portion of the ALJ's decision in Sequoia adopted by the Judicial Officer):

The following year, it held in *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, 399 (1940), that Congress may entrust administrative activities to an industry group, without violation of the nondelegation doctrine as expressed in *Carter Coal,* [298 U.S. 238 (1936),] if the industry members function subordinately to a government agency.

The Secretary assigned the executive direction of Marketing Order 907 to an industry committee pursuant to § 8c(7)(C) of the Act (7 U.S.C. § 608c(7)(C)). This provision of the Act generally charges the Secretary, as did the predecessor Act of 1935 (49 Stat. 750, 757, Aug. 24, 1935), to include in a marketing order, terms and conditions for:

> "Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:
>
> (i) To administer such order in accordance with its terms and provisions;
>
> (ii) To make rules and regulations to effectuate the terms and provisions of such order;
>
> (iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

"No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of the title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided,* That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal."

Other than the last sentence, which was added in 1954 (68 Stat. 897, 907, Aug. 28, 1954), [and amended in 1972 (86 Stat. 780 (1972),] the quoted provisions of the Act were basically derived from § 8c(7)(C) of the 1935 Act, which contemplated the use of

industry groups as administrating agencies of marketing orders.[19]

In contrast to marketing orders for milk, which make provisions for their administration at the hands of a career specialist appointed by the Secretary to whom all functions of administration are delegated, the marketing orders which regulate the handling of various fruits, vegetables, and specialty crops generally assign administrative duties to a committee of industry members, with ministerial functions in turn assigned to an employee manager. Marketing Order 907 is, in this sense, typical of other orders for fruits and vegetables.

Also, as is typical of other orders of this type, Marketing Order 907 authorizes the industry advisory committee to make recommendations to the Secretary, but places ultimate authority in the Secretary to limit and set the quantity of oranges which may be handled in each prorate district during a specified week (7 C.F.R. § 907.52). For this reason the holding of *Carter Coal* is in the main inapposite. As was stated by Justice Douglas in *Sunshine Coal Co. v. Adkins,* 310

[19] *See* H.R. REP. NO. 1241 (1935) at 12; S. REP. NO. 1011 (1935) at 12-13; and Conference Report [H.R. Conf. Rep. No. 1757, 74th Cong., 1st Sess.] (1935) at 22. The Conference Report noted that House Amendment No. 38 to the 1935 Act, to which the Senate receded forbade the selection of cooperative associations to act as agencies to administer orders applicable to milk; and it follows that Congress well understood that industry groups would be selected to administer orders applicable to other commodities.

U.S. 381, 399 (1940): "Nor has Congress delegated its legislative authority to the industry. The members of the ... (industry group) function subordinately to the Commission.... Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid." *See also, Todd & Co. v. SEC,* 557 F.2d 1008, 1012-1013 (3d Cir. 1977); and *First Jersey Securities, Inc. v. Bergen,* 605 F.2d 690, 697 (3d Cir. 1979) [, *cert. denied,* 444 U.S. 1074 (1980)].[66]

Moreover, constitutional challenges directed against marketing orders because of their administration by self-interested industry members have been specifically denied for the reason that the Secretary has retained ultimate authority. *Chiglades Farm, Ltd. v. Butz,* 485 F.2d 1125, 1134 (5th Cir. 1973) [, *cert. denied,* 417 U.S. 968 (1974)]; and *Whittenburg v. United States,* 100 F.2d 520, 522-523 (5th Cir. 1939). *See also, Vaughn-Griffin Packing Company v. Freeman,* 294 F. Supp. 458, 467-468 (M.D. Fla. 1968) [, *aff'd,* 423 F.2d 1094 (5th Cir. 1970); *United States v. Western Fruit Growers, Inc.,* 34 F. Supp. 794, 796 (1940) ("The establishment of pro-rates and allotments ... is the act of the Secretary of Agriculture"), *aff'd in part and rev'd in part,* 124 F.2d 381 (9th Cir. 1941)].[67]

[66] *See, also, R.H. Johnson & Co. v. SEC,* 198 F.2d 690, 695 (2d Cir. 1952), *cert. denied,* 344 U.S. 855 (1952).

[67] Whether NOAC could be authorized to issue volume limitation regulations under 7 U.S.C. § 608c(7)(C)(ii), as long as the Secretary retained ultimate authority by means of a provision such as 7 C.F.R. § 907.81, need not be decided here. It is provided in 7 C.F.R. § 907.81:

§ 907.81. *Right of the Secretary.*

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at an time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary. If the committee, for any reason, fails to perform its duties or exercise its powers under this part, the Secretary may designate another agency to perform such duties and exercise such powers.

Accordingly, the various arguments advanced by petitioners under the nondelegation doctrine have no application except as they serve to emphasize the importance of the Secretary's independent exercise of his retained, decisional powers.

Legislative standards far less specific than those contained in the present Act have been held to state a sufficiently definite standard for administrative action. *See Lichter v. United States,* 334 U.S. 742, 785-86 (1948) ("excessive profits"); *American Power & Light Co. v. SEC,* 329 U.S. 90, 104-06 (1946) ("unduly or unnecessarily complicate the structure" of a corporation, or "unfairly or inequitably distribute voting power"); *Bowles v. Willingham,* 321 U.S. 503, 514-16 (1944) ("generally

fair and equitable [rents that] will effectuate the purposes'' of the Act); *Yakus v. United States,* 321 U.S. 414, 422-27 (1944) (''fair and equitable'' prices that will tend to effectuate the purposes of the Act); *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 600-01 (1944) (''just and reasonable'' rates); *National Broadcasting Co. v. United States,* 319 U.S. 190, 216, 225-26 (1943) (''public interest, convenience, are necessity''); *United States v. Ragen,* 314 U.S. 513, 523-24 (1942) (''reasonable'' allowance for salaries or compensation for services); *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 397-98 (1940) (''fair return'' on the ''fair value'' of property); *FTC v. R.F. Keppel & Brothers, Inc.,* 291 U.S. 304, 311-19 (1934) (''unfair methods of competition''); *Tagg Brothers & Moorhead v. United States,* 280 U.S. 420, 431 (1930) (''just and reasonable'' rates); *Levy Leasing Co. v. Siegel,* 258 U.S. 242, 243, 248-50 (1922) (''fair and reasonable'' rent); *United States v. Donahue Brothers, Inc.,* 59 F.2d 1019, 1023 (8th Cir. 1932) (''unfair, unjustly discriminatory, or deceptive practice or device'').

For the foregoing reasons, there is no basis for petitioners' contention that the California-Arizona Navel Orange Regulatory Program involves an unconstitutional delegation of congressional authority.

Simply, in *In re Saulsbury Orchards & Almond Processing, Inc.,* 50 Agric. Dec. 23, 95-97, slip op. at 88-91 (1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), it is held that assessment provisions under the AMAA do not involve an unconstitutional exercise of the taxing power.

VIII. There Has Been No Violation of the Sunshine Act, the Brown Act, or the Federal Advisory Committee Act.

Petitioners contend that the Marketing Order Committees failed to comply with the Sunshine Act, the Brown Act,

and the Federal Advisory Committee Act (FACA) (Petitioners' Brief filed July 5, 1990, at 233-45) in that the color chip designations for each season were determined at closed Tree Fruit Reserve meetings (*id.* at 239). Petitioners concede, however, that the Sunshine Act does not apply to the Marketing Order Committees (*id.* at 233-34). And petitioners have not appealed from the ALJ's refusal to apply the state statute (the Brown Act) regarding meetings (Initial Decision at 187).

The ALJ held, however, that the committees violated FACA (Initial Decision at 186-95). I disagree, for the reasons stated in dicta in *Wileman I,* 49 Agric. Dec. at 833-34, slip op. at 127-28, as follows:

> Petitioners contend that the Committees and Maturity Subcommittees failed to comply with the Federal Advisory Committee Act, which requires that committee meetings be open to the public, with timely notice published in the Federal Register (Act of Oct. 6, 1972, Pub. L. No. 92-463, 86 Stat. 770 (1972), as amended, *reprinted in* 5 U.S.C. app. at 1175 (1988)). However, no issue was raised in the petition or amended petition as to the Federal Advisory Committee Act and, therefore, the issue cannot be considered in this proceeding (§ II(A)). [The issue is raised in the Amended Petition in *Wileman II.*] But even if the issue could be raised, that statute applies to advisory committees—not to committees with operational responsibilities. The role of the committees under the Agricultural marketing Agreement Act of 1937 and the Marketing Orders is primarily to administer the Orders

on a daily basis. This includes crop estimation; monitoring seasonal production; contracting and interacting with inspection personnel; developing, reviewing and contracting for research and advertising; extensive recordkeeping and gathering and disseminating statistical material, etc. Their function in making recommendations to the Secretary is clearly something secondary that is incidental to and inseparable from their operational functions. It is for this reason that the administrative committees under Federal Marketing Orders are not subject to the Federal Advisory Committee Act.

The Federal Advisory Committee Act (FACA) was enacted in order to terminate unnecssary or duplicative advisory committees and to provide for uniform standards and procedures governing the establishment, operation, administration and duration of advisory committees. Neither the FACA, nor its legislative history, indicates that the Marketing Order Committees are within its ambit. Section 3 of the FACA defines "advisory committee" to include committees established or utilized "in the interest of obtaining advice or recommendations...." The House Report on this legislation states that the term "advisory committee ... does not include committees or commissions which have operational responsibilities. Only those committees established for the purpose of obtaining advice are within the bill's definition." H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3491, 3494. Similarly, the Senate Report on the FACA states

> that committees whose duties were primarily operational "would not fall under the ambit of the bill, but would continue to be regulated under the relevant laws...." S. Rep. No. 1098, 92d Cong., 2d Sess 8 (1972). Hence, neither the language of the FACA, nor the legislative intent underlying the FACA, contemplates coverage under the statute of a committee whose primary function is the administration of a program such as a commodity Marketing Order.

The ALJ states that decisions concerning fruit maturity were made at joint Management Services and Tree Fruit Reserve meetings (Initial Decision at 192a), which were clandestine and which did not advise the Secretary of their positions (Initial Decision at 193-94). However, although FACA is not applicable, the fact is that such meetings were open to the public (Initial Decision at 190-91), and were at times attended by a petitioner's representatives (Ex. 108, 122). The other petitioner has been a member of the Tree Fruit Reserve since 1957 (Ex. 342), and had access to such meetings. The minutes of the Management Services Committee all note that a representative of the Secretary was in attendance to report to the Secretary (e.g., Ex. 132-160, *inter alia,* AMS employees Blackburn, Muck, Kimmel, Olson, and OGC employee Andrews; see also Tr. 2705). In addition, the minutes were sent to the Secretary and were available to the public.

Furthermore, a review of the minutes shows no maturity decisions being made by the Tree Fruit Reserve, as stated by the ALJ (Initial Decision at 186-95). Over the objections of respondent, petitioners subpoenaed and introduced into evidence thousands of pages of Tree Fruit Reserve meeting minutes and documents from 1957 until present (Ex. 34-204, 249(A)-(N), 261, 272-296). But petitioners and the ALJ fail to cite any instance where the

maturity requirements for the season were determined at a Tree Fruit Reserve meeting.[20]

IX. The Relationship Between the Tree Fruit Reserve and the Marketing Orders Is in Accordance With Law.

In various sections of her Initial Decision, the ALJ agrees with petitioners' attack on the Tree Fruit Reserve and its relationship to the Marketing Orders. However, there is no jurisdiction to consider this matter since the Tree Fruit Reserve is not mentioned in the Amended Petition (§ II(A), *supra*).

In an attempt to explain why the Tree Fruit Reserve was not mentioned in the *Wileman I* proceeding (or in the Petition and Amended Petition herein) and, thus, avoid the legal principles of *res judicata* and the jursidctional issue referred to in § II(A), *supra*, petitioners assert that they *never even heard of the existence of the Tree Fruit Reserve* until the late summer or fall of 1989. Yet, petitioner Wileman Bros. & Elliott, Inc., has been a member of the Tree Fruit Reserve since 1957 (Ex. 342) and has transferred funds to the Tree Fruit Reserve a number of times (Ex.343-345). Counsel for both petitioners have also admitted that they received a set of Tree Fruit Reserve minutes from respondent well before the *Wileman I* hearing (Tr. 4933-35; Ex. 399). Tree Fruit Reserve minutes indicate that representatives of petitioner Kash, Inc., attended Tree Fruit Reserve meetings (Ex. 108, p. 2, 122, p. 2). While petitioner Kash, Inc., denies such attendance, it is admitted that a principal of Kash, Inc., signed sheets which contained, *inter alia*, the typed heading "Tree Fruit

[20] Petitioners do not cite any evidence in this respect. The ALJ cites only Exhibits 141 and 142 (Initial Decision at 193-94). However, these are meetings of the Marketing Orders' Management Services Committee, at which there were some discussions regarding maturity, but no final decisions, and which were attended by representatives of the Secretary.

Reserve" (Ex. 108, 122) and attended a Committee meeting where the Tree Fruit Reserve was discussed (Ex. 107). Thus, even if lack of knowledge of the Tree Fruit Reserve would permit petitioners to insert the issue into this proceeding (which is not the case), there is no support for their claim of lack of knowledge.

Although matters relating to the Tree Fruit Reserve are not properly at issue in *Wileman II*,[21] petitioners, over the objections of respondent, introduced numerous exhibits (e.g., Ex. 34-204, 249(A)-(N), 261, 272-296) and questioned witnesses at great length regarding the workings of the Tree Fruit Reserve. The apparent purpose of petitioners was to show that the Tree Fruit Reserve stole assessment money from the Marketing Orders and, hence, petitioners should not be required to pay their assessments.

However, there is no support for the view that a handler need not pay lawfully levied assessments even if there were some misfeasance by those responsible for administering or spending such funds. When taxpayer funds are illegally spent or lost through misfeasance or incompetency by the Defense Department or the Interior Department, every taxpayer does not suddenly get a refund, or receive a dispensation from paying taxes. There is no reason why petitioners' position should be any different. In any event, however, the facts do not support petitioners' claim.

Significantly, it is undisputed that the Tree Fruit Reserve received only $77,522 from the Marketing Orders in the year ending February 28, 1989 (Ex. 204, pp. 3, 7). The amount in prior years was much smaller (Ex. 176-203). This is less than 1% of the assessments under the

[21] Since the Tree Fruit Reserve issue was not raised in the Amended Petition, we have no jurisdiction to consider it here (§ II(A)). In addition, the principles of *res judicata* are applicable to some assessment issues and maturity issues (§ IV).

Marketing Orders (Ex. 255(C), (D) (E)).[22] Therefore, even if all such funds were found to have been stolen or illegally spent, they would at most justify a less than 1% reduction in petitioners' assessment bills, even if petitioners were entitled to a reduction because of mis-spent funds (which is not true).

In their post-hearing brief, petitioners not only argue that the Tree Fruit Reserve stole assessment money from the Marketing Orders, but, also, argue that maturity requirements for each season were decided at Tree Fruit Reserve meetings. Petitioners argue that the Marketing Order Committees violated the Federal Advisory Committee Act and were subject to antitrust liability (Petitioners' Brief filed July 5, 1990, at 176-222, 233-45). The ALJ agreed (Initial Decision at 186-95, 258-83). However, as shown in §§ VIII and X, the Marketing Order Committees are not within the scope of the Federal Advisory Committee Act, and this is not a proper proceeding in which to determine whether the Committees and their members are exempt from antitrust liability.

Even if the activities of the Tree Fruit Reserve were properly at issue here, the record shows that the relationship between the Tree Fruit Reserve and the activities under the Marketing Orders was in accordance with law. It is undisputed that the Tree Fruit Reserve was incorporated in 1957, but existed well back into the 1930's or 1940's. For a number of years, the Marketing Orders were not allowed to carry over funds from season to season. Therefore, in order to allow for operational stability, the Tree Fruit Reserve lent money to the Committees whenever necessary. The Department for many years also had a policy which forbade Marketing Order Committees from owning property, especially real property. Tree Fruit Reserve has, thus, owned real property,

[22] Actually, the percentage is even smaller, since the $77,522 in payments includes funds from the federal pear portion of Order 917 and from the State pear order, neither of which is at issue herein.

automobiles, and office equipment and furniture, which were leased to the Committees (Tr. 4780-81). *The Tree Fruit Reserve has on its own also engaged in activities which the Committees are unauthorized to do (e.g., lobbying Congress regarding import legislation). Petitioners admit there is nothing illegal about this private corporation engaging in any of these activities.*

It is also undisputed that many, at least, of the officers and members of the Board of Directors of the Tree Fruit Reserve are members of one or more of the Marketing Order Committees. Because of this fact, Tree Fruit Reserve meetings have been held in conjunction with Committee meetings and, for a period of years, joint minutes were kept (Ex. 149-163). Again, there is no reason why Committee members may not legally participate as members or officers of the Tree Fruit Reserve or any other private corporation.

The ALJ at one point states that the Tree Fruit Reserve was established to thwart the Marketing Order limitations (Initial Decision at 260), *but later she concedes that it was formed to benefit the industry* (id. at 261a), and then states that it became warped some time later. She concludes, without cited legal authority or factual support, that the Tree Fruit Reserve is the unlawful "alter ego" of the Marketing Order Committees (Initial Decision at 135, 161, 173, 182, 185, 190, 209, 260, 269, 303, 311).[23] The AMAA and the Marketing Orders authorize and require that the Committee members be active grower and handler businessmen in the tree fruit industry, rather than government employees. Hence, those Committee members

[23] It might be noted that the ALJ does cite seemingly contradictory statements by an outside accountant as to whether the Tree Fruit Reserve should be considered "affiliated" or a "related party" for some accounting or tax purposes (Initial Decision at 202-05). But that outside accountant was not qualified to comment on the relationship between the Secretary's Marketing Order Committees and the Tree Fruit Reserve, with respect to the issues involved here, or to comment on the legality of that relationship.

must necessarily attend to running their own businesses, without such activity being considered as a conflict of interest. There is no reason why such committee members might not also be active in the Tree Fruit Reserve, the Chamber of Commerce, a political party, or any trade association that takes part in activities that are beyond the authority of a Marketing Order Committee. There is no support for the view that such participation is illegal. As noted above, the AMAA clearly has no prohibition on such conduct. Nonetheless, the ALJ concludes that virtually every activity of the Marketing Order Committees was unlawful, because of the existence of the Tree Fruit Reserve (Initial Decision at 200-01, 205-10; see also *id.* at 161, 173, 182, 185, 190, 260, 269, 303, 311).

Based on the undisputed facts noted above, petitioners and the ALJ condemn the Tree Fruit Reserve and its relationship with the Committees. Certainly the petitioners, the Committees and the Secretary are free to debate the desirability of this relationship between the Committees and the Tree Fruit Reserve, and to debate whether or not any changes in the procedures would be advantageous. But the only question in a § 8c(15)(A) proceeding is whether the relationship is "in accordance with law." Certainly, the program statute contains no prohibition on any of these activities, and the petitioners and the ALJ cite no authority to the contrary.

Since there is nothing illegal per se in the relationship between the Tree Fruit Reserve and the Committees, petitioners and the ALJ make unsupported allegations of wrongdoing in the conduct of that relationship. With regard to the claim that maturity requirements for the coming season were decided at Tree Fruit Reserve meetings, petitioners introduced no testimony or documentary evidence, nor did the ALJ note any. The record contains numerous Tree Fruit Reserve minutes (Ex. 34-169), but petitioners and the ALJ have not cited any

instance therein where the maturity requirements were decided.

The rest of the claims of wrongdoing are dependent on a factual determination that the Tree Fruit Reserve was stealing money from the Marketing Orders, i.e., that the Tree Fruit Reserve was receiving money from the Marketing Orders without providing goods and services of commensurate value (Petitioners' Brief filed July 5, 1990, at 177). This was allegedly accomplished through the rental by the Tree Fruit Reserve to the Marketing Orders of office space in Sacramento, automobiles, and office equipment and furniture, and through the transfer by the Committees to the Tree Fruit Reserve of profits from ripening bowls (*id.* at 176-86). However, the record does not support petitioners' claims.

The building in question was constructed many years ago by the Tree Fruit Reserve. The seed money for this organization came from the voluntary contributions of individual handlers. Rather than personally keep and use the refunds to which they were entitled under the Marketing Orders, various handlers chose to instruct the staff of the Marketing Orders to send the refund amount directly to a private group, the Tree Fruit Reserve. The documentary evidence in this proceeding shows that this was a voluntary decision by each individual handler (Ex. 343-346). In no manner did the Marketing Order Committees or their staff exercise any decisionmaking as to where a refund should be paid. They merely followed the directions of the individual handlers. One of the petitioners, for example, at some times chose to keep the refund (Ex. 346), and at other times chose to give it to the Tree Fruit Reserve (Ex. 343-345). There is no support for petitioners' claim that the Committees and their staff chose to give the refunds to the Tree Fruit Reserve.

With regard to more recent transfers of funds to the Tree Fruit Reserve, the documentary evidence shows that all of

the funds are in the nature of rent for the Sacramento office, automobiles, or office equipment and furniture (Ex. 203-204). In total they constitute less than 1% of the budget of the Marketing Order Committees. Even if all such payments were found to be unauthorized and reprehensible, they still would be of such minor impact on the Marketing Orders' budgets that they could not justify petitioners' failure to pay their assessments. However, the record shows that all such payments were made for sufficient consideration.

The rent since 1989 has equaled the prevailing office rental prices in that area of Sacramento (Tr. 4712, 4716-17; Ex. 204, 387, 388). Even at this price, the office rental can be considered a bargain since the building is unique in that it is the work of a renowned architect and enjoys extra parking and fine, established landscaped grounds (Tr. 4715-17). Prior to 1989, the building rental was much lower ($17,250 to $30,000), with the Marketing Orders and their handlers benefiting from a rental rate that was effectively subsidized by the Tree Fruit Reserve (Tr. 4711, 4778-79; Ex. 196-203). In short, the only record evidence is that the rent paid for the Sacramento building was at, or, more often, below, the fair market value.

It cannot be reasonably disputed that the Committees and their staff need office space in order to function. It is a matter of record that the Department would not allow Marketing Order Committees to own real property (Tr. 4780-81). In the instant case, the rent paid was always at or below the market rate. Hence, no handler money was "stolen" by the Tree Fruit Reserve by means of office rent.

Petitioners and the ALJ seek to explore how the Tree Fruit Reserve spends its income, and the details of the Tree Fruit Reserve's mortgage on the building. However, what the landlord did with the rent money, or whether the landlord still has a mortgage on the property, is irrelevant,

regardless of whether the landlord is the Tree Fruit Reserve or some banking institution. The questions of wrongdoing by the Committees end with the answer that the Committees got fair market value or better consideration for their payments.

The ALJ repeats petitioners' allegations that the building should somehow belong to the Marketing Orders, and that it was paid for with handler assessments (Initial Decision at 261a-263). The fact is, as stated above, the building was started with individual contributions by handlers to the Tree Fruit Reserve, and the mortgage was paid off by the Tree Fruit Reserve from the discount rents charged to the Marketing Orders. Whether the Tree Fruit Reserve changed its mind about offering free or discount rent to the Marketing Order Committees, or what the Tree Fruit Reserve did with its rent collection, is irrelevant. The building rightly belongs to the Tree Fruit Reserve, and the Committees have paid either fair market value or discount rent for many years. Hence, there is no evidence of theft of Marketing Order Committee funds or illegal action by the Secretary or his Committees.

Under the ALJ's theory, if government employees properly performed their official duties and chose to invest their salary in a gambling casino, an abortion clinic or a religious crusade, the Department of Agriculture would be acting in an illegal or unauthorized manner if it were aware of the employees' investments and still continued to employ and pay the employees, since the Department could not directly invest in those activities. Such a position is not supportable.

All of the automobiles used by the Committees' staff were paid for by the Tree Fruit Reserve, which leased them back to the Committees (Tr. 4686-88). Several witnesses testified (Tr. 4668, 4687, 4266-69), and offered documentary evidence (Ex. 379, 362), that the automobiles were purchased after painstaking procedures to ensure that

the lowest price was obtained. Furthermore, the cars purchased were obviously not extravagant luxury cars (Ex. 379, 362). The yearly rental rate by Tree Fruit Reserve was simply determined: net cost of car minus the salvage value, with the difference divided by three. After three years, no further rent was charged for the car (Tr. 4688-89). What the Committees effectively have is a three-year car loan that is interest free. Furthermore, the salvage value is deducted from the principal at the beginning, so the Committees do not have to wait 3 or more years to get the benefit of the salvage value. It is an arrangement that is to the overwhelming benefit of the Committees. Thus, rather than any money being "stolen" from the Committees, the Committees are being subsidized by the Tree Fruit Reserve by means of the car rentals. The ALJ, without elucidation, finds such benefits "illusory" (Initial Decision at 263). I disagree.

The only other direct transfer of funds to the Tree Fruit Reserve is a small fixed amount of rent for the use of all office equipment and furniture owned by the Tree Fruit Reserve (Ex. 196-204). This rental fee has been $3,000 per year until the past few years, when it was raised to $3,500 per year (Tr. 4778-79; Ex. 196-204). There is no evidence that this rental fee is in any manner excessive.

The undisputed evidence in the record indicates that the Marketing Order Committees consistently have received more than the fair market value in necessary goods and services from the Tree Fruit Reserve for their rental payments. Rather than assessment money being stolen, the

Order handlers have received fair value, or more, for their money.[24]

Petitioners and the ALJ also contend that assessment money was indirectly stolen from the Marketing Orders in that the *ripening bowl business was taken over by the Tree Fruit Reserve*, and employees of the Committees performed services for the Tree Fruit Reserve (Initial Decision at 265-68, 237-74). These charges also lack merit.

The documentary evidence establishes that during the early to mid 1980's, revenue to the Marketing Order Committees from the sale of ripening bowls was on a steady decline (Ex. 156, attachments). Furthermore, while budget documents indicated a net profit from these sales, the figures were illusory in that they did not reflect the enormous amount of staff time devoted to handling correspondence and to filling the numerous small orders (Tr. 4706-09). In fact, the sale of ripening bowls produced little or no profit for the Committees (Tr. 4708-09), and the Department advised that such sales should not be conducted on a profit-making basis (Tr. 4706). Therefore, in 1986, the Committees discontinued the sale of ripening bowls (Tr. 4705; Ex. 158, p. 2). Due to some subsequent demand, in 1988-89 the Tree Fruit Reserve undertook to sell ripening bowls (Tr. 4705-06) on a limited basis with 2,500 bowl minimum orders (Tr. 4903). The inventory of ripening bowls owned by the Committees was purchased by the Tree Fruit Reserve (Tr. 4709-10; Ex. 386). In 1988-89, the Tree Fruit Reserve earned $3,648 ($43,070 income minus $39,422 expense) on the sale of ripening bowls (Ex. 204, p. 3). It is unclear whether the $3,648 was

[24]The ALJ suggests (Initial Decision at 263-65) that an expensive computer, bought with Marketing Order money, was transferred to the Tree Fruit Reserve at salvage value after only one year. However, this is not true. All that occurred was that there was Committee discussion that such a transfer would happen if the same policy were used as was applicable to old typewriters. To this day, however, no transfer has occurred, and the computer is owned by the Committees and not the Tree Fruit Reserve (Tr. 4781).

all profit, or was partly reduced by unspecified administrative costs.

The ALJ's discussion of the ripening bowls ignores the facts. She merely states that the ripening bowls were once very profitable, without addressing the point that any such past profitability, even if true, was no longer existent when the Committees decided to sell the ripening bowls. The ALJ further states that the transfer of the bowls to the Tree Fruit Reserve was not documented, thus overlooking the check receipt (Ex. 386) and uncontradicted testimony (Tr. 4705-06, 4709-10, 4903) cited above. Finally, the ALJ asserts that the "ripening bowl income for the first year after its re-introduction exceeded One Hundred Twenty-Five Thousand Dollars ($125,000.00) prior to expenses" (Initial Decision at 268). In truth, the document relied upon is a year-in-advance estimate that in 1989-1990, the gross income from the bowls would be $125,000 (Ex. 167, p. 5). The ALJ fails to mention that the same page of Exhibit 167 estimates ripening bowl expenses for the same year to be $112,500. Thus, there is a projected net profit for 1989-1990 of $12,500. Furthermore, in the first year (1988-1989), the actual profit was $3,648, as cited above (Ex. 204, p. 3).

In summary, the evidence shows that the Marketing Order Committees were not allowed to, and did not, make a profit on ripening bowls, and expended an unacceptable amount of staff time on this activity. Such sales were voluntarily discontinued and, years later, all remaining inventory was sold to the Tree Fruit Reserve. Thus, no assessments were "stolen" by the Tree Fruit Reserve with regard to the ripening bowl matter. Furthermore, the current income over acquisition expenses, even if considered to be all profit, is so minute ($3,648) compared to these tens of million dollar Committee budgets as to have no practical effect on any handlers.

With regard to administrative and management services provided by Committee employees to the Tree Fruit

Reserve, for many years such services constituted just a "very minimal" amount of time (Tr. 4779). All Marketing Order employee salaries and benefits are paid for by the Committees, and not the Tree Fruit Reserve (Tr. 4702-05; Ex. 385). In view of the large subsidy traditionally given to the Marketing Order Committees by the Tree Fruit Reserve (i.e., low building rent until 1989, low automobile lease price, low furniture and equipment rental price), there was deemed to be no need for a separately stated accounting and billing to the Tree Fruit Reserve to reflect these "very minimal" number of hours of employee services (Tr. 4778-79). However, in 1989, the building rent went to a more commercial rate, the Tree Fruit Reserve became more active, and the Department expressed a desired for more business-like arrangements (Tr. 4778; Ex. 204). Therefore, a reimbursement agreement was signed (Ex. 30(C)), which provides that the Tree Fruit Reserve pays the Committees $1,250 per quarter for managerial-administrative services. There is no evidence to dispute the fact that this agreement adequately reimburses the Committees for these costs.

In summary, any employee services provided by the Committees to the Tree Fruit Reserve have either been adequately reimbursed, or have been more than offset by enormous lease and rental price breaks. Here, again, no handler assessments have been stolen. The record herein is devoid of any evidence of dishonesty by the Marketing Order Committees or the Tree Fruit Reserve in their dealings. There is no statutory impediment to the relationship between the Marketing Order Committees and the Tree Fruit Reserve. As far as the record herein shows, at all times, dealing between these organizations have been honest, with the Marketing Order Committees receiving more than a fair return for their money and services. All common expenses in the relationship, such as insurance, have been scrupulously divided out to the proper

organization (Tr. 4782-83). Thus, there is no basis to petitioners' attacks on the relationship between the Tree Fruit Reserve and the Marketing Order Committees.

X. Whether the Marketing Order Committees' Members Are Immune From Antitrust Liability Is Not a Proper Issue Here.

In their brief before the ALJ, petitioners argued that the Committee members were in violation of the antitrust laws of the United States in connection with their activities in recommending and applying the maturity requirements under the Act (Petitioners' Brief filed May 16, 1990, at 88-102; Petitioners' Brief filed July 5, 1990, at 176-222). The ALJ agreed (Initial Decision at 258-83). However, this issue is not cognizable here.

First, whether the Committees' members are immune from the antitrust laws in connection with their activities involved here is far beyond the scope of the jurisdiction in 7 U.S.C. § 608c(15)(A). *See In re Allen*, 5 Agric. Dec. 734, 737-38 (1946); *In re Brucer Dairy*, 3 Agric. Dec. 247, 252 (1944).

Second, such a challenge is not contained in the Amended Petition herein and, hence, is beyond the scope of this proceeding (§ II(A), *supra*). Accordingly, I express no opinion on this issue.

However, it should be noted that if such arguments were appropriate here (which is not the case), they would necessarily be limited to the 1988 and 1989 seasons, since the legality of the maturity regulations for prior years was expressly dealt with or waived in the *Wileman I* proceeding.

XI. The Secretary's Decisionmaking Regarding the Establishment of Promotional Programs Under Marketing Orders 916 and 917 Was in Accordance With Law, and the Formal Rulemaking Records, Which Provide the Basis for the Promotional Programs, Are Unchallenged in This Proceeding.

In their Amended Petition, petitioners fail to challenge the sufficiency of the formal rulemaking proceedings which provide the legal basis for the promotional programs under these Marketing Orders. Rather, petitioners base their challenge to the advertising programs on the regulations implementing the assessment rates for each season. Petitioners cite numerous cases stating basic administrative law principles, but do not apply those principles to the rulemaking records that they must challenge in order to sustain their allegations. (See Petitioners' Brief field July 5, 1990, at 16-24.) Instead, petitioners' challenge is based solely on an attack of the Federal Register notices implementing the assessment rates for the individual harvest seasons, with only passing mention and incorrect citation in their post-hearing brief to the formal rulemaking proceedings that implemented the promotional programs. (See Petitioners' Brief filed July 5, 1990, at 22). This is the only attempted citation to the formal rulemaking records by petitioners. No mention of the formal rulemaking records is included in their Amended Petition.

As shown below (§ XI(A)), Congress amended the AMAA to allow for paid promotional advertising programs to be conducted under Marketing Orders 916 and 917 to serve a compelling government interest in accordance with

its authority under the Commerce Clause.[25] The Secretary then conducted formal rulemaking proceedings to determine whether implementation of such programs would tend to effectuate the declared policy of the Act. Based on substantial record evidence adduced at the formal rulemaking hearings held in accordance with 5 U.S.C. §§ 556 and 557, the Secretary implemented amendments to the Orders calling for such programs.

A review of the statutory background of the AMAA, specifically the provision allowing for the Secretary of Agriculture to promulgate Marketing Orders that include promotional programs for agricultural commodities, reveals that Congress carefully devised a plan to effectuate a substantial governmental interest pertaining to an area of the economy long left in the regulatory hands of Congress (§ XI(A)). Additionally, a review of the promulgation of the Marketing Order provisions allowing for the promotion of California peaches, plums and nectarines, as well as the provisions enabling the Secretary to promulgate the budgets which fund such promotion, demonstrates that the Secretary, in following the dictates of Congress, conducted formal rulemaking hearings, unchallenged in this proceeding, in order to determine the desirability and the means of conducting promotional programs under Marketing Orders 916 and 917 (§ XI(B)). There is no basis to petitioners'

[25]The constitutionality of Marketing Order regulation under the AMAA has been analyzed and upheld against various constiutional challenges throughout the years. The Supreme Court has held that the AMAA is a "constitutional exercise of the commerce power." *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942). The Court held in *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 577 (1939), that the provisons requiring approval of Marketing Orders by referenda are not an unconstitutional delegation of authority. *See also Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (AMAA provides proper standards for the Secretary's administrative power in making an order); *Edwards v. United States*, 91 F.2d 767 (9th Cir. 1937) (referendum provisions are not unconstitutional for delegation of legislative authority to growers and handlers).

(§ XI(C)) or the ALJ's (§ XI(D)) challenges to the promotional programs.

A. Statutory Provisions.

Congress enacted the AMAA in 1937 in order to stabilize market conditions and ameliorate the harsh economic conditions that can result from alternating shortages and surpluses. Congress declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest. . . ." 7 U.S.C. § 601. Congress declared its policy to allow the Secretary of Agriculture to "establish and maintain such orderly marketing conditions for [specified agricultural commodities, including fruits] . . . as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). Congress specifically conferred upon the Secretary the power to "establish and maintain such production research, marketing research, and development projects . . . as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." 7 U.S.C. § 602(3).

The principal means developed by Congress to effectuate these goals is the promulgation of Marketing Agreements and Orders as set out in 7 U.S.C. § 608c. That section directs the Secretary of Agriculture to issue Marketing Orders after notice and a hearing conducted whereby any interested party is given the opportunity to testify, and after the Secretary finds that the Order's terms "will tend

to effectuate the declared policy'' of the Act. 7 U.S.C. § 608c(4). Marketing Orders may not become effective until they have been approved by two-thirds of the affected producers. 7 U.S.C. §§ 608c(8), (9). Amendments to Marketing Orders are promulgated in the same manner. 7 U.S.C. § 608c(17).

In 1954, Congress found that there was a need to provide for yet ''greater stability in the products of agriculture.'' H.R. Rep. No. 1927, 83d Cong., 2d Sess. 1, *reprinted in* 1954 U.S. Code Cong. & Admin. News 3399. Congress concluded that the remedy should include a program ''to protect the income of the farmers while comprehending the interests, needs and security of all segments of the economy and of all our people.'' *Id., reprinted at* 1954 U.S. Code Cong. & Admin. News 3403. Congress therefore adopted a bill which would implement a means to ''encourage the expansion of markets and consumption at home and abroad.'' *Id.*

Toward that end, Congress amended the AMAA authorizing the Secretary of Agriculture to promulgate Marketing Orders ''establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.'' Agricultural Act of 1954, Pub. L. No. 83-690, § 401, 68 Stat. 906 (1954), codified at 7 U.S.C. § 608c(6)(I). Authority to conduct ''production research'' and development projects designed to ''assist, improve, or promote'' efficient production, was added in 1970. Pub. L. No. 91-292, 84 Stat. 333 (1970). Authority for projects providing ''for any form of marketing promotion including paid advertising'' for a specified commodity (cherries) was added in 1962. Pub. L. No. 87-703, § 403, 76 Stat. 632 (1962). Plums and nectarines were included in this

category in 1965. Pub. L. No. 89-330, 79 Stat. 1270 (1965). *California-grown* peaches were included in this category in 1971. Pub. L. No. 92-120, 85 Stat. 340 (1971).[26]

B. Marketing Order Provisions Authorizing Advertising Programs Under Marketing Orders 916 and 917, Promulgated on the Basis of Unchallenged Rulemaking Records.

After Congress amended the AMAA to authorize provisions for research and promotion programs, the Secretary conducted formal rulemaking hearings to determine whether such programs would ''tend to effectuate the declared policy'' of the Act, as provided by 7 U.S.C. §§ 608c(4), (17). On April 5-6, 1965, a hearing was held in Fresno, California, pursuant to a notice published at 30 Fed. Reg. 3542 (1965). The notice invited interested persons to testify, *inter alia,* on a proposal to add a new provision to Marketing Order 917 authorizing marketing research and development projects. A Recommended Decision was published at 30 Fed. Reg. 13,063 (1965), which recommended adding such a provision and invited written exceptions to be submitted. On the basis of the formal hearing record, unchallenged in this proceeding, the Secretary determined that the amendment would ''tend to effectuate the declared policy of the act.'' 30 Fed. Reg. 14,321, 14,322 (1965); 30 Fed. Reg. 15,990 (1965). A referendum was conducted whereby at least two-thirds of the producers, who also produced at least two-thirds of the volume of plums and peaches produced in the production area, favored the adoption of the amendments to the Order. 30 Fed. Reg. 15,990, 15,991 (1965). Thus, § 917.39 (7 C.F.R. § 917.39 (1966)) was adopted, which stated:

[26]The Secretary has no statutory authority to provide for ''marketing promotion including paid advertising'' in Marketing Orders for peaches grown in any State other than California. 7 U.S.C. § 608c(6)(I).

> The committees, with the approval of the Secretary, may establish or provide for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of fruit. The expense of such projects shall be paid from funds collected pursuant to § 917.37.

Formal rulemaking conducted in 1971, unchallenged in this proceeding, resulted in amending § 917.39 to include authority for "production research" for peaches and "production research" and "paid advertising" for plums. 36 Fed. Reg. 4056 (1971); 36 Fed. Reg. 5614 (1971); 36 Fed. Reg. 7510 (1971); 36 Fed. Reg. 8735 (1971); 36 Fed. Reg. 11,737 (1971); 36 Fed. Reg. 14,381, 14,382 (1971). Formal rulemaking conducted in 1976 resulted in amending § 917.39 to include authority for paid advertising for peaches. 41 Fed. Reg. 14,375 (1976); 41 Fed. Reg. 17,528 (1976). Thus § 917.39 (7 C.F.R. § 917.39) was amended to read as it does today:

> The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

Based on the formal rulemaking record unchallenged in this proceeding, the Secretary concluded in his 1971

Recommended Decision as to plum (36 Fed. Reg. 8735, 8736-37 (1971)):

> [I]t is proposed to add authority in the order for the committees to establish production research projects in addition to marketing research and development projects. Such projects which are designed to assist, improve, or promote the marketing, distribution, and consumption, or efficient production of plums and pears may involve substantial expenditures. In addition, with respect to plums, authority would be added for the Plum Commodity Committee to engage in any form of promotion including paid advertising. It is highly desirable that the recommendations with respect to any such projects, as well as recommendations on regulations under the sections previously cited, have a high degree of support by the respective committee and the industry. It is therefore concluded that the order should be amended, as hereinafter set forth, to require an affirmative vote by the Plum and Peach Commodity Committees for the approval of actions and recommendations pursuant to the specified sections as indicated.
>
> . . . .
>
> The plum industry has supported advertising and promotional activities for plums under a State marketing order since 1966. The evidence indicates that economies could be effected and it would otherwise be advantageous to the industry if such activities were carried out under the order. The

order currently is managed under a management sharing arrangement in conjunction with seven other marketing programs. The sharing of overhead costs among these programs reduces the costs of operation for each program. The evidence indicates that provision for paid advertising activities for plums, and vesting authority therefore in the Plum Commodity Committee, would place the plum industry in a better position to advance the interests of growers and this would tend to effectuate provisions of the act and the order. Therefore, the order should be amended as hereinafter set forth to authorize any form of marketing promotion for plums, including paid advertising.

. . . .

The record shows that the consensus of the industry is that promotional activities for plums have been beneficial in increasing demand and should be continued. Plums compete for shelf space and retail promotion with many processed and fresh fruits, many of which are now nationally advertised and promoted. In competing for this space and attention plums should benefit from a promotional program which offers the retailer an attractive quality product which the industry helps sell with an advertising and promotional campaign. The following promotional and advertising techniques together with the relative advantages were cited as examples of techniques which may be employed under the authorization: Publicity education is a good technique to use when

promotional funds are limited, particularly if a major portion of the program is directed to newspaper food pages. Food page publicity which makes available serving suggestions, product information, stories and recipes, many of them illustrated by appetizing photographs, often will be given newspaper editorial space which, if evaluated at advertising rates, is worth many times the fee paid the publicity agency. Women look to the food pages of newspapers and magazines, radio and TV programs, and to local extension home economists and utility company personnel for guidance in meal planning. They readily accept suggestions from these sources as reliable and acceptable information. The expanded authority for promotion, including paid advertising, would enable the committee to supply plum information and publicity materials to food news editors and similar persons for appropriate distribution. It is recognized, however, that publicity education activities do have a disadvantage in that one cannot control the message. Since editorial space cannot be bought, one cannot dictate an editor's handling of a story. This disadvantage is more than offset, however, by the fact that good publicity education brings the greatest return for the dollar expended.

The second promotional and advertising technique is merchandising. The development and distribution of attractive point-of-sale material and other merchandising aids are promotional devices used by many fresh fruit industries with promotional budgets.

Plums are particularly well adapted because of the numerous colorful varieties and their seasonal nature which requires that their availability be brought to the attention of consumers during their relatively short marketing season. Artistically developed pieces may serve the dual function of both attracting and informing the consumer regarding the varieties as their marketing seasons occur.

. . . .

The third technique is paid advertising, often referred to as "media". Media is expensive but some things can be done in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for a seasonal fruit such as the plum. Spot radio or TV commercials in the principal markets during peak movement periods is a possibility. It has been found in many fresh promotional programs that such spot announcements, particularly when developed with a "dealer tag" at the end of each spot. have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be merchandised in such a way as to secure extra display space, and

promotional price and tie-in advertising financed by the retailer.

Since most of the food page publicity occurs in newspapers, some newspaper advertising might be indicated partly because newspapers are understandably influenced in favor of advertisers when scheduling editorial space. Such ads at the beginning of the season could take the form of announcing the seasonal availability of the fruit while later ads could elaborate upon the deliciousness of the fruit and pinpoint periods of greatest availability.

The Plum Commodity Committee should have the responsibility of developing and carrying out each season's advertising and promotinaal program.

No exceptions to the Plum Recommended Decision were filed (36 Fed.Reg. 11,737, 11,737, (1971)), and the recommended findings were adopted as the Secretary's final findings (*ibid.*). The Order Amending the Order as to plums was effective 30 days after the August 5, 1971, publication date (36 Fed. Reg. 14,381 (1971)).

Based on the formal rulemaking record unchallenged in this proceeding, the Secretary concluded as to peaches in his 1976 Final Decision (41 Fed. Reg. 14,375, 14,376-77 (1976)):

> (2) Promotional activities for peaches and pears are presently conducted under State marketing orders. The record shows a wide consensus among the peach and pear industries that promotional activities have been beneficial in increasing demand and should be continued. The evidence indicates that

economies could be effected and that it would otherwise be advantageous to the peach and pear industries if such activities were carried out under the order. Current promotional activities have focused on the "California Summer Fruits" theme covering peaches, pears, plums and nectarines. The sharing of overhead and administrative costs reduces the costs of promotional activities for each fruit. The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefore in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the interests of growers, and this would tend to effectuate provisions of the act and the order. Therefore, the order should be amended as hereinafter set forth to authorize any form of marketing promotion for peaches and pears permitted by the act, including paid advertising.

Major promotional effort may appropriately be directed to the following objectives: (1) To make prospective consumers aware of the products' availability, their characteristics and uses, (2) to encourage in-store promotional activity, and (3) to foster improved handling of fruit at wholesale and retail levels. However, such objectives should not be considered all inclusive, and the committees should be authorized to pursue such other objectives as may be determined to be appropriate and authorized by the act.

The following promotional and advertising techniques were cited as examples of techniques which may be employed:

. . . .

Publicity education is a good promotional technique. Food page publicity which makes available recipes, serving suggestions, selection and ripening tips will generally be given newspaper editorial space. The food pages of newspapers and magazines, radio and TV programs and local extension home economists are valuable sources for guidance in meal planning. Consumers readily accept suggestions from these sources as reliable and acceptable information. The proposed authority for market promotion, including paid advertising, would enable the committee to supply peach and pear information and publicity materials to food news editors and similar persons for appropriate distribution. . . .

Another techniques is paid advertising, often referred to as "media." Media generally is expensive but some things can be done selectively in this field that are inexpensive and yet create an impact on the buying trade as well as the consuming public. Trade paper ads, particularly at the beginning of the season, together with the editorial support which trade papers are willing to accord an advertiser are helpful in launching a program for seasonal fruits such as peaches and pears. Spot radio or TV commercials in the principal markets during peak movement periods have proved to be

successful. It has been found in many fresh promotional programs that spot announcements, particularly when developed with a "dealer tag" at the end of each spot, have considerable influence in triggering retail promotions. "Dealer tags" are blank spots at the end of the announcements in which the announcer refers to a local retailer as a good place to purchase the product. These spots can be me[r]chandised in such a way as to secure extra display space and promotional price and tie-in advertising financed by the retailer.

The Peach and Pear Commodity Committees should have the responsibility of developing and carrying out each season's advertising and promotional program. In developing recommendations for such program, the respective committees, prior to initiation of any such program, should submit their recommendations and plans to the Secretary for approval.

The Order Amending the Order as to peaches was effective April 29, 1976 (41 Fed. Reg. 17,528, 17,534 (1976)).

Formal rulemaking hearings to amend Marketing Order 916 regulating nectarines to include authority to conduct research and promotion were held in 1958, 23 Fed. Reg. 3007 (1958); 23 Fed. Reg. 3666 (1958); 23 Fed. Reg. 4616 (1958); and in 1966 (to include paid advertising), 31 Fed. Reg. 5635 (1966); 31 Fed. Reg. 6871 (1966); 31 Fed. Reg. 8176 (1966).[27] These formal rulemaking proceedings, unchallenged in this proceeding, led to the adoption of § 916.45 (7 C.F.R. § 916.45) as it reads today:

[27] The Order was amended to authorize production research in 1971 (36 Fed. Reg. 9289, 9290 (1971)).

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form of marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.

Based on the unchallenged record of the hearings, the Secretary concluded in his 1966 Recommended Decision as to nectarines (31 Fed. Reg. 5635, 5636 (1966)):

In the past decade production of California nectarines has increased three-fold. With the assistance of quality control regulation and limited market development work under the order, the industry has been able to market this volume with reasonable success. However, nectarines are marketed in a highly competitive situation. They compete for shelf space and retail advertising attention with a host of processed and fresh fruits, many of which are nationally advertised and promoted. Hence, authority for expanded promotional activity, including paid advertising is needed in the order so the committee will possess the means to strengthen the competitive position of nectarines to maintain or to expand sales as the occasion demands. . . .

This [lack of consumer knowledge] makes it difficult to get the volume of nectarine

movement necessary to maintain favorable prices when the peak volume is available for markets. The employment of advertising techniques, as proposed to be authorized under the order, would provide the committee with a means whereby sales would be stimulated and returns to producers enhanced. Such promotional techniques designed to increase the consumer knowledge and awareness relative to the availability, nutritional qualities, and uses of nectarines should be authorized to be employed as the occasion requires to achieve a more favorable balance between supply and demand. It is not possible at this time to visualize the exact type of promotional program that would be required to meet the needs of the industry. Therefore, the authority for the committee to establish promotional and advertising projects should be broad and flexible, and available to the extent permitted under the act to facilitate timely development of programs suitable to the circumstances. Campaigns to expand markets in low consumption areas would necessarily involve long-range objectives and suitable educational techniques to achieve such objectives. Stimulation of demand in areas where nectarines are already being used in volume, and where the objective is to obtain an immediate response would employ different techniques.

In the establishment of promotional programs for nectarines the committee should be authorized to decide the feasibility of and

to employ, with the approval of the Secretary, singly or in combination, such promotional and advertising techniques as may be deemed suitable to the objective. These techniques should include, but not be restricted to, publicity education, merchandizing, dealer service, trade paper and daily newspaper advertisement, spot radio announcements, television, and magazine advertising with the objective of promoting the marketing, distribution, and consumption of nectarines.

. . . .

The funds to cover the costs of any promotional program, including advertising should be obtained by levying assessments on shipments of nectarines in the same manner that such are levied to finance the administrative and other costs of the Nectarine Administrative Committee. Likewise, the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval.

No exceptions to the Nectarine Recommended Decision were filed (31 Fed. Reg. 6871, 6871 (1966)), and the recommended findings were adopted as the Secretary's final findings (*ibid.*). The Order Amending the Order was effective June 10, 1966 (31 Fed. Reg. 8176, 8177 (1966)).

Thus, the Secretary's decisions to implement the promotional programs for nectarines, plums and peaches were based solely on the record evidence presented at the formal rulemaking hearings cited therein, which record evidence is not challenged in this proceeding. As to each

of the amendments to the Marketing Orders providing for advertising programs to be paid for by handlers' assessments, the Secretary determined, on the basis of the formal hearing records, unchallenged in this proceeding, that the amendments would "tend to effectuate the declared policy of the act." 31 Fed. Reg. 6871, 6872 (1966); 31 Fed. Reg. 8176, 8176 (1966) (nectarines); 36 Fed. Reg. 11,737, 11,737 (1971); 36 Fed. Reg. 14,381, 14,381 (1971) (plums); and 41 Fed. Reg. 14,375, 14,379 (1976); 41 Fed. Reg. 17,528, 17,528 (1976) (peaches). And as to each of the amendments, a referendum was conducted whereby the producers favored the adoption of the amendments to the Orders. 31 Fed. Reg. 8176, 8176 (1966) (nectarines); 36 Fed. Reg. 14,381, 14,381 (1971) (plums); and 41 Fed. Reg. 17,528, 17,528 (1976) (peaches).

C. Petitioners' Challenges to the Promotional Programs Are Without Merit.

Petitioners' attempts to challenge the validity of the Secretary's decision to implement advertising programs under Marketing Orders 916 and 917 fail to address the appropriate records and have no basis in law or fact.

1. Petitioners' Contention That the Rulemaking Records Implementing the Promotional Programs Do Not Provide Substantial Record Evidence for the Secretary's Decisions Is Without Merit.

As discussed above in § XI(A), § 608c(17) of the AMAA directs the Secretary to hold formal hearings on the record to determine whether an amendment to an Order would effectuate the "declared policy" of the Act. Thus, these proceedings are governed by 5 U.S.C. §§ 556 and 557 of the APA. As stated in 5 U.S.C. § 553(c), "[w]hen

rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection." "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. . . ." 5 U.S.C. § 556(e).

In order to succeed in their challenges to the advertising programs under these Orders, petitioners must prove that the "transcript of testimony and exhibits, together with all papers and requests filed in the proceeding," do not provide substantial evidence for the Secretary's decisions. 5 U.S.C. § 556(e). In applying that standard, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). See § III, *supra*.

However, petitioners failed to address the appropriate formal rulemaking records before the Secretary. No challenge to the formal rulemaking records is included in their Amended Petition. Then, in their post-hearing reply brief, petitioners merely make the conclusory assertion that "the Secretary of Agriculture failed to measure up to his obligation for reasoned decisionmaking in initially establishing regulations for the imposition of forced 'generic' advertising assessments on the tree fruit industry" (Petitioners' Brief filed July 5, 1990, at 19), with no analysis of the records whatsoever. Indeed petitioners totally ignore the extensive formal records available. Petitioners did not put any evidence presented at the formal rulemaking proceedings of 1966, 1971 and 1976 into this case. Yet, in their post-hearing briefs, they claim to be challenging the rulemaking records. Petitioners cite only the Recommended Decision involving plums, and then they fail to address it whatsoever. Petitioners then mistakenly cite the Recommended Decision involving

production research for nectarines (not paid advertising), and cite nothing at all involving the formal rulemaking implementing paid advertising for peaches. Such a challenge to the records falls far short of meeting petitioners' burden of proof. Since petitioners did not put the formal rulemaking records underlying the Orders' advertising provisions into evidence in this proceeding, it must be presumed that substantial evidence supports the Order provisions at issue here. § III, *supra.*

2. Petitioners' Contention That the Approval of Promotional Budgets Under Marketing Orders 916 and 917 Has Been in Violation of the APA Is Without Merit.

According to petitioners, Marketing Orders 916 and 917 require the Secretary to conduct notice-and-comment rulemaking procedures each year in order to implement advertising programs. A review of the Orders and the formal rulemaking records shows this to be incorrect. The formal rulemaking records provide the legal basis for the manner in which the advertising budgets are to be determined. For example, the Secretary's decision as to nectarines states that ''the anticipated expenses of advertising and promotion should be included in the budget of expenses submitted to the Secretary for his approval'' (31 Fed. Reg. 5635, 5636 (1966); 31 Fed. Reg. 6871 (1966)). Both Marketing Orders require that the expenses of ''marketing promotion including paid advertising'' be paid by the assessments collected from handlers, as their pro rata share of the Committees' yearly budgets (7 C.F.R. §§ 916.41, .45, 917.37, .39). It is presumed, until proven contrary, that substantial evidence in the hearing records supports those provisions (§ III, *supra*).

According to the formal rulemaking records and the Orders, the Committees are required to include their

proposed advertising expenditures to the Secretary with their proposed budget of their anticipated expenses for each fiscal year. See 31 Fed. Reg. 5635, 5636 (1966); 31 Fed. Reg. 6871 (1966) (7 C.F.R. §§ 916.31(c), .41, .45, 917.35(f), .37, .39). At that time, the Secretary may approve or disapprove of the proposed expenditures. The Secretary may adopt the proposed expenditures, he may reject portions of the recommended expenditures, or he may reject all advertising expenditures for that year, just as he may do with any expenditure in the Committees' proposed budgets. The desirability of allowing the Committees to propose advertising expenditures was determined through the formal rulemaking procedures of 1966, 1971 and 1976, as described above in § XI(B). If the Secretary wishes to reconsider the desirability of allowing for proposals for paid advertising under the Orders, he may conduct further formal rulemaking. Indeed, petitioners may petition the Secretary to conduct such formal rulemaking hearings. However, petitioners' contention that the Marketing Orders *require* additional notice-and-comment rulemaking regarding the desirability of an advertising program every fiscal year is clearly disproved by examination of the formal rulemaking records, which petitioners have not introduced or challenged.

The Secretary's approval of the Committees' budgets is not subject to rulemaking at all, but is a matter left to the discretion of the Secretary. The ALJ expressly stated that view in her Initial Decision in *Wileman I,* and I agreed with, and adopted, those legal views in my Decision in *Wileman I,* 49 Agric. Dec. at 783-96, slip op. at 76-88. *Res judicata* applies here (claim preclusion as to 1984-87 seasons, issue preclusion as to other seasons) (see § IV, *supra*).

As shown at the oral hearing in this case, the Secretary approved the proposed advertising budgets of the Committees only after review of voluminous documents submitted

by the Committees regarding the proposed advertising to be conducted under the Orders. The Secretary approves the advertising expenditures each season based on review of various documents such as: California Summer Fruit Field Staff Bulletins providing weekly updates of successes and other information regarding promotional activities (Ex. 297(G)-(P)); minutes of promotional subcommittee meetings, export subcommittee meetings, economic subcommittee meetings (Ex. 297(W)-(Z)); research reports (Ex. 297(T), (U), (V), (BB)); and proposed budgets (See e.g., Ex. 297(BB) and (CC)). Thus, through examination of Exhibit 297, it can be seen that the Secretary has approved the advertising and research budget each year, including 1988, only after examination of voluminous reports, proposals and budgets.

Furthermore, the approval of the budget is left to the discretion of the Secretary, and the Secretary is not required to engage in rulemaking every season regarding the desirability of the advertising programs. Rather, based on the authority of the formal rulemaking records implementing the programs, the Secretary has the authority to approve advertising expenditures proposed by the Committees in their yearly budget. *See Wileman I,* 49 Agric. Dec. at 793-95, slip op. at 85-86.

Since deciding *Wileman I,* on further consideration of the legal requirements as to the necessity for publishing assessment *rates* (as distinguished from the budget *determinations*) in a regulation, I have concluded that there is no requirement even that the assessment rates be published in a regulation. In *In re Saulsbury Orchards & Almond Processing, Inc.,* 50 Agric. Dec. 23, 170, slip op. at 166 (1991), *appeal docketed,* No. CV-F-91-064 REC (E.D. Cal. Feb. 8, 1991), I stated:

> In addition, after considering petitioners' argument as to retroactivity, it is no longer

> my view that the assessment rate must be included in a *regulation.* In *Wileman I,* quoted above in § V, I adopt the view of the ALJ in that case that, even though the approval of the budget by the Secretary does not have to be accomplished by rulemaking, the levy of an assessment must be done by means of a regulation. However, there is nothing in the Agricultural Marketing Agreement Act of 1937 that requires that a handler's assessment obligations be set forth in a regulation (see 7 U.S.C. §§ 608c(6)(I), 610(b)(2)(ii-(iii)). Since the Order, published in the Federal Register after a formal rulemaking hearing, expressly requires handlers to pay their pro rata share of expenses approved by the Secretary, and expressly authorizes retroactive assessment determinations (7 C.F.R. §§ 981.80, .81), it is my present view that the Secretary could notify handlers by personal notice or otherwise of their assessment obligations, without issuing a regulation.

I further held in *Saulsbury* that if notice-and-comment rulemaking were required, the appropriate remedy would be to let the Secretary now engage in notice-and-comment rulemaking for each year, stating (50 Agric. Dec. at 153-55, slip op. at 148-52):

> Even if the Secretary's failure to engage in notice-and-comment rulemaking with respect to the assessment rates for the 1980-81 through the 1986-87 crop years were error (which is not the case), the appropriate remedy would be to remand the matter to the

Secretary, so that the Secretary could now engage in notice-and-comment rulemaking with respect to each crop year, and retrospectively establish the appropriate assessment rate for each year, upon the basis of the comments received (see § I, Additional Conclusions by the Judicial Officer, excerpt from *Wileman I*). It would be a drastic and unconscionable remedy to completely invalidate the assessment rates for 7 years, and hold that, as a result of the Secretary's failure to comply with the notice and comment provisions, handlers were not obligated to pay any assessments for those 7 years.

The expenses for those 7 years have already been incurred on the basis of the Order and the regulations. There is no ready source of funds to repay all the handlers who would be entitled to repayment, under a holding that the assessments were invalid, with no opportunity to correct the mistake. The assessment rates for the 7 years produced approximately 72.3 million dollars (RX 94, 96, 103, 106, 110, 115, 119). If petitioners are entitled to a repayment of their assessments (or to be relieved from the obligation to pay any assessments not already paid), every other handler regulated by the Order may be entitled to the same relief. The Secretary would certainly have to consider whether he should voluntarily repay the assessments to all handlers for all or some of the years involved. There is no statute of limitations applicable to the filing of a § 8c(15)(A) proceeding by any almond

handler regulated by the Order. Unless laches were held to be applicable to some of the earlier years (as to petitioners and other handlers), all other handlers could still file § 8c(15)(A) proceedings as to this same issue.[22] Even in the absence of such § 8c(15)(A) petitions, the Secretary would have to consider whether he should voluntarily reimburse all other handlers for all or some of the years.

If the Secretary were to determine that other handlers should be reimbursed for all or part of the assessment obligations during the 7 years, the only source of funds would be through an increase in the Board's budget for the year in which repayments are to be made. That is, handlers in the repayment year would pay an assessment rate that would provide funds not only for the current year but for the 7 years involved in this case. Instead of the typical assessment rate of about 2.8¢ per pound, the assessment rate for the repayment year would be about eight times that amount, or 22.4¢ per pound (2.8 × 8 = 22.4). If all handlers in the repayment year handled the same proportionate part of the almond crop as they did during the 7 years involved here, each handler would merely be providing sufficient money to the Board to repay himself. Any handler whose proportionate part of the total crop was greater during the repayment year than

[22] In my view, laches should apply to any assessment obligation as to which a § 8c(15)(A) petition is not filed within 2 years after the Secretary's issuance of the assessment rule. *Cf.* 7 C.F.R. § 1000.6 (providing 2-year period for the termination of obligations under milk marketing orders).

during the 7 years involved here would pay more than he received as reimbursement. Any handler who received repayment for those 7 years who was no longer in business (and would, therefore, pay no part of the repayment-year's budget), or whose proportionate part of the almond crop in the repayment year was less than during those 7 years, would receive more than he paid to the Board.

The effect of increasing the repayment year's assessment rate to approximately 22.4¢ per pound would have to be carefully considered by the Secretary. Could this rate be passed on to producers, or to the buyers? If so, what would it do to producers or to the demand for almonds? If it could not be passed on, could the handlers afford to pay such an assessment rate, even thogh most, if not all, of the handlers, would be getting a substantial part of it back from the Board? Until the possibility of an extraordinary expense budget to repay handlers' assessment monies is ended, will handlers be able to sell their businesses to others? Could the Secretary now lawfully establish a statute of limitations, that would cut off the existing rights of handlers who paid assessment obligations during the period involved here, without giving them a reasonable opportunity to file a § 8c(15)(A) proceeding?

The difficulties that would be presented, if the failure to engage in notice-and-comment rulemaking required complete invalidation of the assessment rates for the 7 years in question, strongly support the remedy of

permitting the Secretary to correct his error by retrospective rulemaking, through engaging in notice-and-comment rulemaking as to these 7 years at this time, and issuing the retrospective assessment rates that he would have issued, based on all of the knowledge gained through the notice-and-comment rulemaking proceedings.

Another reason supporting the retrospective rulemaking approach is the fact that the failure to engage in notice-and-comment rulemaking, if it were required by the APA, is a technicality that is not likely to produce any new information not known to the Secretary through the public-meeting approach and Committee-and-Board-meeting approach now followed under the program. The regulated industry is relatively small (there are just over 100 handlers) and highly knowledgeable as to the public meetings and other means that are employed to acquaint the Secretary with all of the facts influencing his ultimate decisions. The same things happen each year at about the same time, and they are widely publicized in industry circles. Furthermore, the assessment rate does not change drastically from year to year, absent some significant program change. For example, in the 7 years involved here, the assessment rates were 2.8¢, 2.85¢, 2.85¢, 2.85¢, 2.78¢, 2.7¢, and 2.6¢, all "less any amount credited pursuant to § 981.41 but not to exceed 2.5¢ per pound." (The creditable assessment figure of 2.5¢ per pound did not change at all during the 7 years.) Considering all of the information

available to the Secretary from industry meetings and Board and Committee recommendations, it is not realistic to believe that the Secretary would have changed the assessment rate, including the creditable portion thereof, if notice-and-comment rulemaking had been engaged in. But if it is held that the Secretary's failure to engage in notice-and-comment rulemaking was fatal error, the only reasonable remedy is to remand the proceeding so that the Secretary can retrospectively issue the appropriate assessment rates for those 7 years based upon the knowledge derived from the new notice-and-comment rulemaking. If a reviewing court should disagree with this view, consideration should also be given as to whether any reimbursement is just and reasonable, considering all of the facts and circumstances (see the quotation from *Wileman I,* set forth in § I of the Additional Conclusions by the Judicial Officer).

3. Petitioners' Contention That the Formal Rulemaking Implementing Paid Advertising Was in Violation of the APA Is Without Merit.

Petitioners, in their post-hearing brief (but not in their Amended Petition, which precludes consideration of the issue here (§ II(A)), make the erroneous challenge that the formal rulemaking records, on the basis of which the Orders were amended to authorize advertising programs for plums and nectarines, "allowed only a 10-day notice and comment period, clearly, a violation of the Administrative Procedure Act" (Petitioners' Brief filed July 5, 1990, at 22). Petitioners apparently confused the formal and

informal rulemaking procedures. All of petitioners' case citations in support of this argument refer to informal rulemaking.

As an initial matter, the APA does *not* require a 30-day notice and comment period for *any* rulemaking. (See § XII(B), *infra*). As stated above in § XI(C)(1), the formal rulemaking conducted to implement the advertising programs under the Orders was subject to the provisions of §§ 556 and 557 of the APA. (Informal rulemaking proceedings are governed by 5 U.S.C. § 553). Section 557 states that the parties are entitled to a "reasonable opportunity" to submit, for the consideration of agency employees, "exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions" (5 U.S.C. § 557(c)). Thus, there is a requirement for a reasonable opportunity for parties to submit written exceptions to the Secretary's Recommended Decision. Such opportunity was provided in every instance regarding the formal rulemaking proceedings implementing the advertising programs under these Orders. 36 Fed. Reg. 8735 (1971); 31 Fed. Reg. 5635 (1966) (*See Wileman I,* 49 Agric. Dec. at 794-95, slip op. at 86-87).[28] Thus, petitioners' claims are without merit.

4. Petitioners' Contention That the Secretary Should Have Considered Allowing for Advertising "Credits" Under the Promotional Programs for Peaches, Plums and Nectarines Is Without Merit.

Peitioners complain that the Secretary has not considered whether cedits should be allowed from mandatory advertising assessment programs for direct expenditures for

[28] As shown in *Wileman I,* 49 Agric. Dec. at 794-95, slip op. at 86-87, the 10 days allowed for filing exceptions to the Recommended Decisions was after 2 weeks in one case, and several weeks in the other, had been allowed for filing post-hearing briefs.

specific brand name advertising. (Petitioners' Brief filed July 5, 1990, at 19-20, 88). However, the Secretary of Agriculture is not authorized by the AMAA to implement an advertising program for peaches, plums or nectarines that includes "advertising credits." The AMAA provides an exclusive list of those commodities regulated by Marketing Orders that may include advertising credits in their promotional programs. Only Marketing Orders regulating "almonds, filberts (otherwise known as hazel nuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order" (7 U.S.C. § 608c(6)(I)). Unless Congress amends the AMAA, the Secretary of Agriculture cannot consider a "credit" advertising program for peaches, plums and nectarines.

5. Petitioners' Contention That the Secretary Did Not Consider Alternatives Is Without Merit.

Petitioners complain that the Secretary did not consider "viable alternatives." (See Petitioners' Brief filed July 5, 1990, at 21-24). But the petitioners have not shown what alternatives may have been before the Secretary at the formal hearings. As discussed above, the Secretary must base his decisions exclusively on the records before him. However, petitioners do not cite alternatives placed before the Secretary at the rulemaking proceedings.

In *Farmer's Union Cent. Exch., Inc. v. Federal Energy Regulatory Comm'n*, 734 F.2d 1486, 1511 n.54 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984), the court observed that the duty to consider alternatives extends only to "significant and viable" alternatives, not to "every alternative device and thought conceivable by the mind of man" (quoting *Vermont Yankee Nuclear Power Corp. v. Natural*

Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)). In *City of Brookings Mun. Tele. Co., v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987), the court held that agencies are required to consider *significant, proposed,* alternatives. The court found in that case that a "*proposed alternative* was 'certainly significant,'" and that "[i]t was also sufficiently 'obvious' to warrant the Commission's attention." *Id.* (emphasis added). Furthermore, "not only was [the proposal] prominently featured in [a] submission, it was discussed further ... by ... two [parties]." *Id.* Petitioners cite *no* proposals or alternatives placed before the Secretary in any rulemaking challenged herein. Thus, petitioners' challenges in this regard are without merit.

In addition, as stated above (§ XI(C)(2)), the Secretary is not required to engage in rulemaking each year to consider the budgets relating to advertising programs, including whether there should be any advertising expenditures. The formal promulgation rulemaking records, which are not challenged by petitioners, are sufficient, in this respect, under the AMAA and the Orders.

6. Petitioners' Contention That the Record Is Devoid of Consideration as to the Benefits of the Promotional Programs Is Without Merit.

Petitioners argue that the record is devoid of consideration as to the benefits of advertising, appropriate formats for advertising and costs of advertising. Petitioners, however, fail to challenge the appropriate formal rulemaking records. The formal rulemaking records disuss these issues at length. See e.g., 41 Fed. Reg. 14,375, 14,376-77 (1976); 31 Fed. Reg. 5635, 5636 (1966). Petitioners make no attempt to examine these records, which include transcripts of the oral hearings cited therein. Therefore, petitioners' contention that there is no evidence that the Secretary considered the issues surrounding the programs is rejected.

The Secretary's decision to implement advertising programs for these commodities, and the manner in which he determines the advertising budget, is supported by formal rulemaking records unchallenged in this proceeding. Furthermore, it is evident that petitioners' claims stem from a disagreement regarding the type of programs that should be administered, how the budget for the programs should be determined, and the type of programs that would be most efficacious. However, these are inappropriate challenges in a § 8c15(A) proceeding. Petitioners' sole remedy lies in petitioning the Secretary for a rulemaking hearing to amend the Orders. *Sequoia,* 47 Agric. Dec. at 99, slip op. at 118. Petitioners' claims are without merit and it seeks its remedy in the wrong forum.

Furthermore, the Secretary's decision to approve the advertising budgets each season can hardly be considered lacking in depth, or as arbitrary or capricious. As discussed above (§ XI(C)(2)), the decision to approve the advertising budgets was based on a review of thousands of documents provided from the field. See Ex. 297.

D. The ALJ's Conclusions as to the Promotional Programs Are Erroneous.

The ALJ's Initial Decision ignores, without comment, most of the contentions of petitioners, as outlined above. Further, the ALJ does not examine in any detail the formal rulemaking documents, or the records therefor, establishing the promotional and advertising programs in the Marketing Orders. The ALJ appears to conclude, without any cited authority, that the formal rulemaking never anticipated the size of the budgets today, or that office space and equipment would be rented from the Tree Fruit Reserve (Initial Decision at 285, 295). She appears to be of the view that each year the Secretary must conduct notice-and-comment rulemaking for the Committees' budget approval. However, I adhere to the view expressed by the ALJ in

Wileman I, and in my Decision in *Wileman I* (49 Agric. Dec. at 783-96, slip op. at 76-88), that the budget approval process is not subject to notice-and-comment rulemaking.

The ALJ does not accept as adequate Exhibit 297, which is the material upon which the Secretary's budget approvals since 1980 were based. First, she states that it contains no comprehensive study of the effects of advertising on sales (Initial Decision at 297). While it appears there are many documents before the Secretary reflecting such effects (e.g., Ex. 297(T), (U), (V)), this in fact is a formal rulemaking question as to whether advertising should be authorized as a desirable expense. To the extent it is a yearly budget approval inquiry, it is within the Secretary's discretion, and does not require notice-and-comment rulemaking. The ALJ also suggests that Exhibit 297 must be faulty since most of the material was supplied by the Committees (Initial Decision at 297). However, it is not even claimed by petitioners that there is any evidence that the material is untrue, unrepresentative, or unreliable. Finally, the ALJ suggests that there is no indication that the material in Exhibit 297 was ever reviewed by the Secretary personally, or by anyone in the Department (Initial Decision at 304). However, there is no requirement that the Secretary of Agriculture personally review every budget item for the Department or its Marketing Order Committees. Furthermore, *Exhibit 297 was stipulated into evidence by the parties at the material that was reviewed by the Department in its budget approval process.* It is not for the ALJ to create an issue where the parties have agreed ther is none.[29]

The remainder of the ALJ's Initial Decision regarding the promotion regulations involves the issue of retroactivity, which is discussed in § XII(D), *infra.*

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[29]The ALJ suggests that since only certain varieties of fruit are advertised, there is "[b]y admission," no benefit to other sellers (Initial Decision at 298). Respondent made no such admission, and the record supports the view that advertising of one variety gives a residual benefit to other varieties (Ex. 297).

* * *

[ORIGINAL PAGES 139-209 omitted to the end]

All arguments made have been fully considered. To the extent that any arguments are inconsistent with the views set forth herein, and are not specifically mentioned, they are rejected as irrelevant, without merit, or without support in the record.

For the foregoing reasons, petitioners' Petitions and Amended Petition should be dismissed.

Order

The relief requested by petitioners is denied and the Petitions and Amended Petitions are dismissed.

Done at Washington, D.C.

September 30, 1991

Donald A. Campbell
Judicial Officer

APPENDIX H

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, provides, in pertinent part:

§ 608a. Enforcement of chapter

* * * * * *

(6) Jurisdiction of district courts

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this chapter, in any proceeding now pending or hereafter brought in said courts.

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as ''handlers.'' Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible,

but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable; single commodities and separate agricultural commodities

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans, and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees, and naval stores as included in the Naval Stores Act [7 U.S.C. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided,* That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the

Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing[1] and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated

[1] So in original. Probably should be followed by a comma.

as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Other commodities; terms and conditions of orders

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of

any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods

shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each

producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding clause (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however,* That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i).

(I) Establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided,* That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas,

carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, or Florida-grown strawberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, and Florida Indian River grapefruit may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further,* That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit or pears for canning or freezing one or more representatives of processors of the commodity specified in such order: *Provided,* That in a marketing order applicable to pears for canning or freezing the representation of processors and producers on such agency shall be equal.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(15) Petition by handler for modification of order or exemption; court review of ruling of Secretary

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15))

shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

* * * * *

§ 610. Administration

* * * * *

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide ***

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency,

during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

* * * * *

APPENDIX I

Title 7 of the Code of Federal Regulations provides, in pertinent part:

§ 917.16 Designation of Control Committee.

A Control Committee is hereby established consisting of 12 shipper members and 13 commodity committee members, and the members shall be selected in accordance with the provisions of § 917.17 through § 917.19. The members shall be selected annually for a term ending on the last day of February, and said members shall serve until their respective successors are selected and have qualified.

§ 917.20 Designation of members of commodity committees.

There are hereby established a Pear Commodity Committee and a Peach Commodity Committee each consisting of 13 members and a Plum Commodity Committee consisting of 12 members. Each commodity committee may be increased by one public member nominated by the respective commodity committee and selected by the Secretary. The members of each said committees shall be selected biennially for a term ending on the last day of February of odd numbered years, and such members shall serve until their respective successors are selected and have qualified. The members of each commodity committee shall be selected in accordance with the provisions of § 917.25.

§ 917.30 Removal and disapproval.

The members of the Control Committee, including their respective successors and alternates, and the members of each commodity committee, including their respective

successors and alternates, and any agent or employee appointed or employed by the Control Committee and the members of any other committee established pursuant to the provisions of this subpart shall be subject to removal or suspension at any time by the Secretary. Each regulation, decision, determination, or other act of the Control Committee, or any commodity committee, or any other committee established pursuant to the provisions of this subpart, shall be subject to the continuing right of the Secretary to disapprove of the same at any time; and, upon such disapproval, each such regulation, decision, determination, or other act, shall be deemed null and void except as to acts done in reliance thereon or in compliance therewith prior to such disapproval by the Secretary.

§ 917.34 Duties of Control Committee.

The Control Committee shall have the following duties:

(a) To act as intermediary between the Secretary and any grower or shippers.

(b) To keep minute books and records which will clearly reflect all of the acts and transactions of said Control Committee; and such minute books and records shall be subject at any time to examination by the Secretary or by such person as may be designated by the Secretary.

(c) To investigate, from time to time, and assemble data on the growing, shipping, and marketing conditions respecting fruit, as defined in § 917.4; to engage in such research and service activities in connection with the handling of such fruit as may be approved, from time to time, by the Secretary; and to furnish to the Secretary such available information as may be requested.

(d) To appoint such employees, agents, and representatives as it may deem necessary, and to determine the compensation and define the duties of each.

(e) To develop and provide the commodity committees data on shared expenses to facilitate equitable apportionment of such expenses in the development of budgets.

(f) To confer with representatives of shippers and growers of fruit produced in other states and areas with respect to the formulation or operation of marketing agreements providing for the regulation of shipments among the several states and areas in the United States in which such fruit is grown.

(g) With the approval of the Secretary establish procedures for the selection and appointment of a public member and alternate to each of the commodity committees.

(h) To establish and define the duties of additional committees or subcommittees to assist in the performance of any of the duties and functions of the Control Committee.

(i) To defend all legal proceedings against any committee members (individually or as members) or any officers or employees of such committees arising out of any act or omission made in good faith pursuant to the provisions of this part.

(j) To cause the books of the Control Committee to be audited by a competent accountant at least once each fiscal period and at such other time or times as the Control Committee may deem necessary or as the Secretary may request. Such audit shall indicate whether the funds have been received and expended in accordance with the provisions of this part.

(k) To appoint nomination committees if it deems proper for any or each nomination meeting held pursuant to §§ 917.21 through 917.23. Such nomination committees would canvas prospective members and alternate members to the commodity committees to determine their eligibility and willingness to serve and present a slate of nominees to the meeting or meetings. The presentation of nominees by the nominating committee at these meetings shall not exclude the right of any grower to nominate any eligible person at such meeting.

§ 917.35 Powers and duties of each commodity committee.

Each commodity committee shall have the following powers and duties:

(a) With regard to the respective fruit for which it was established, to establish production research and marketing research and development projects as authorized under § 917.39, to recommend to the Secretary regulation of shipments pursuant to the provisions of this part, and to possess such other powers and exercise such other duties as will properly effectuate the purpose of this part: *Provided, however,* That the Peach and Pear Commodity Committee shall each approve actions under § 917.39 and make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than nine members of each said committee: *Provided further,* That the Plum Commodity Committee shall approve such actions pursuant to § 917.39 or make said recommendations pursuant to §§ 917.40 through 917.43 only upon the affirmative vote of not less than eight members of said committee.

(b) To make such rules and regulations with respect to fruit for which it was established as may be necessary to effectuate the terms and provisions of this part.

(c) To forward to the Control Committee and to the Secretary a record of the minutes of each meeting of the commodity committee.

(d) To establish such other committees to aid the commodity committee in the performance of its duties under this part as may be deemed advisable.

(e) Each season prior to any recommendation to the Secretary for a regulation of shipments pursuant to §§ 917.40 through 917.43 to determine the marketing policy to be followed for the respective commodity during the ensuing fiscal period and to submit such policy to the Secretary, said policy report to contain, among other

provisions, information relative to the estimated total production and shipments of the fruit by districts, information as to the expected general quality and size of fruit, possible or expected demand conditions of different market outlets, supplies of competitive commodities, such analysis of the foregoing factors and conditions as the committee deems appropriate, and the type of regulations of shipments expected to be recommended for the respective fruit.

(f) To submit as soon as practicable after the beginning of each fiscal year to the Secretary, for his approval, a budget of its expenses for such fiscal period, including its proportional share of the expenses of the Control Committee and an explanation of the items therein, and a recommendation as to the rate of assessment for the respective fruit for which the commodity committee was established.

(g) With the approval of the Secretary, to redefine the Districts into which the State of California has been divided under § 917.14 or change the representation of any representation area affecting the respective commodity committee: *Provided, however,* That if any such changes are made, representation on any such committee from the various representation areas shall be based, so far as practicable, upon the proportionate quantity of the respective fruit shipped from the respective representation area during the preceding three fiscal periods: *Provided further,* That the commodity committees shall follow the principle, so far as practicable, of assigning a member position on the commodity committees to any representation area from which five percent of regulated shipments have originated during such periods.

§ 917.36 Expenses.

Each commodity committee is authorized to incur such expenses as the Secretary finds are reasonable and are

likely to be incurred by the said commodity committee during each fiscal period for the maintenance and functioning of such committee, including its proportionate share of the expenses of the Control Committee; and for such research and service activities relating to handling of the fruit for which the commodity committee was established as the Secretary may determine to be appropriate. The funds to cover such expenses shall be acquired by the levying of assessments as provided in § 917.37.

§ 917.37 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and are likely to be incurred by the commodity committees during a fiscal period, each handler shall pay to the control Committee, upon demand, assessments on all fruit handled by him. The payment of assessments for the maintenance and functioning of the committees may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the respective rate of assessment which handlers shall pay with respect to each fruit during each fiscal period in an amount designed to secure sufficient funds to cover the respective expenses which may be incurred during such period. At any time during or after the fiscal period, the Secretary may increase the rates of assessment in order to secure funds to cover any later findings by the Secretary relative to such expenses, and such increase shall apply to all fruit shipped during the fiscal period.

(c) In order to provide funds to carry out the functions of the commodity committee prior to commencement of shipments in any season, shippers may make advance payments of assessments, which advance payments shall be credited to such shippers and the assessments of such

shippers shall be adjusted so that such assessments are based upon the quantity of fruit shipped by such shippers during such season. Any shipper who ships fruit for the account of a grower may deduct, from the account of sale covering such shipment or shipments, the amount of assessments levied on said fruit shipped for the account of such grower.

§ 917.39 Production research, market research and development.

The committees, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research, and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of fruit. Such projects may provide for any form of marketing promotion including paid advertising. The expenses of such projects shall be paid from funds collected pursuant to § 917.37.

§ 916.20 Establishment and membership.

There is hereby established a Nectarine Administrative Committee consisting of eight members, each of whom shall have an alternate who shall have the same qualifications as the member for whom he is an alternate. The members and their alternates shall be growers or employees of growers. Five of the members and their respective alternates shall be producers of nectarines in District 1. One member and his alternate shall be producers of nectarines in District 2; one of the members and his alternate shall be producers of nectarines in District 3; and one member and his alternate shall be producers of nectarines in District 4.

§ 916.31 Duties.

The committee shall have, among others, the following duties:

(a) To select a chairman and such other officers as may be necessary, and to define the duties of such officers;

(b) To appoint such employees, agents, and representatives as it may deem necessary, and to determine compensation and to define the duties of each;

(c) To submit to the Secretary as soon as practicable after the beginning of each fiscal period a budget for such fiscal period, including a report in explanation of the items appearing therein and a recommendation as to the rate of assessment for such period;

(d) To keep minutes, books, and records which will reflect all of the acts and transactions of the committee and which shall be subject to examination by the Secretary;

(e) To prepare periodic statements of the financial operations of the committee and to make copies of each such statement available to growers and handlers for examination at the office of the committee;

(f) To cause its books to be audited by a competent public accountant at least once each fiscal year and at such times as the Secretary may request;

(g) To act as intermediary between the Secretary and any grower or handler;

(h) To investigate and assemble data on the growing, handling, and marketing conditions with respect to nectarines;

(i) To submit to the Secretary the same notice of meetings of the committee as is given to its members;

(j) To submit to the Secretary such available information as he may request;

(k) To investigate compliance with the Provisions of this part;

(l) With the approval of the Secretary, to redefine the districts into which the production area is divided and to reapportion the representation of any district on the committee: *Provided,* That any such changes shall reflect, insofar as practicable, shifts in nectarine production within the districts and the production area.

§ 916.40 Expenses.

The committee is authorized to incur such expenses as the Secretary finds are reasonable and likely to be incurred by the committee for its maintenance and functioning and to enable it to exercise its powers and perform its duties in accordance with the provisions of this part. The funds to cover such expenses shall be acquired in the manner prescribed in § 916.41.

§ 916.41 Assessments.

(a) As his pro rata share of the expenses which the Secretary finds are reasonable and likely to be incurred by the committee during a fiscal period, each person who first handles nectarines during such period shall pay to the committee, upon demand, assessments on all nectarines so handled. The payment of assessments for the maintenance and functioning of the committee may be required under this part throughout the period it is in effect irrespective of whether particular provisions thereof are suspended or become inoperative.

(b) The Secretary shall fix the rate of assessment to be paid by each such person during a fiscal period in an amount designed to secure sufficient funds to cover the expenses which may be incurred during such period and to accumulate and maintain a reserve fund equal to approximately one fiscal period's expenses. At any time during or after the fiscal period, the Secretary may increase the rate of assessment in order to secure sufficient funds to cover any later finding by the Secretary relative to the expenses which may be incurred. Such increase shall be applied to all nectarines handled during the applicable fiscal period. In order to provide funds for the administration of the provisions of this part during the first part of a fiscal period before sufficient operating income is available from assessments on the current year's shipments, the committee may accept the payment of assessments in advance, and may also borrow money for such purposes.

§ 916.45 Marketing research and development.

The committee, with the approval of the Secretary, may establish or provide for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution and consumption or efficient production of nectarines. Such projects may provide for any form or marketing promotion including paid advertising. The expense of such projects shall be paid by funds collected pursuant to § 916.41.

§ 916.62 Right of the Secretary.

The members of the committee (including successors and alternates), and any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.